(1) No. 961296 JAN 30 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

THOMAS E. HORTON,

Petitioner,

v.

UNION RECOVERY LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

Jon M. Lippard*
JON M. LIPPARD, PC
First Floor
314 Commerce Street
Alexandria, VA 22314
(703) 836-8723

Counsel of Record
Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

26 pp

QUESTION PRESENTED

1. Whether the six-year statute of limitations under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(14), applicable by its plain language only to actions brought by the RTC as receiver for a failed financial institution, creates an assignable statutory right that permits assignees of the RTC to bring an action on a demand note beyond the statute of limitations applicable under state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THE VIRGINIA SUPREME COURT OPINION DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT REGARDING STATUTORY CONSTRUCTION OF THE FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT ("FIRREA") AND OTHER COMPLEX FEDERAL LEGISLATION 5

A. The Virginia Supreme Court Opinion Disregards the Plain Language Rule 6

B. The Virginia Supreme Court Opinion Fails to Address the Decision of the United States Supreme Court in O'Melveny & Myers v. FDIC 9

1. "There is no federal general common law" 10

2. There is "no significant conflict with an identifiable federal policy or interest" to justify displacement of state law rules of decision 12

3. The United States Supreme Court rejected the Ninth Circuit's application of D'Oench, Duhme to create federal law where state law governs 14

C. The Trial Court Properly Relied on the WAMCO Decision 16

II. THIS PRECISE ISSUE IS PENDING IN THE FOURTH CIRCUIT AND THERE IS A SUBSTANTIAL POSSIBILITY OF A SPLIT IN AUTHORITY 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Page

A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp.,
62 F.3d 1454 (D.C. Cir. 1995) 11

Boyle v. United Technologies Corp.,
487 U.S. 500 (1988) 12

Caminetti v. United States,
242 U.S. 470 (1917) 6

CMF Virginia Land, L.P. v. Brinson,
806 F. Supp. 90 (E.D. Va. 1992) 14

Demarest v. Manspeaker,
498 U.S. 184 (1991) 6

D'Oench, Duhme & Co. v. FDIC,
315 U.S. 447 (1942) 8, 14-16

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 10

Fall v. Keasler,
No. C-90-20643-SW (ARB),
1991 WL 340182 (N.D. Cal. 1991) 8

FDIC v. Bledsoe,
989 F.2d 805 (5th Cir. 1993) 8-15, 17

FDIC v. O'Melveny & Myers,
969 F.2d 744 (9th Cir. 1992),
rev'd, ___ U.S. ___,
114 S. Ct. 2048 (1994).....9, 13, 14

Guth v. Hamlet Associates, Inc.,
230 Va. 64, 334 S.E.2d 558 (1985) 17

Kamen v. Kemper Financial Services, Inc.,
500 U.S. 90 (1991).....12

Milwaukee v. Illinois,
451 U.S. 304 (1981).....11

Mountain States Financial Resources Corp. v. Agrawal,
777 F. Supp. 1550 (W.D. Okla. 1991).....8, 15

Northwest Airlines, Inc. v. Transport Workers,
451 U.S. 77 (1981).....11

O'Melveny & Myers v. FDIC,
___ U.S. ___, 114 S. Ct. 2048,
2054 (1994)..... 7-13, 15, 19

RTC v. Young,
93 Civ. 6531 (LMM),
1996 U.S. Dist. LEXIS 5916,
*3 (S.D.N.Y. 1996).....13

RTC Commercial Loan Trust v. Winthrop Mgt.,
923 F. Supp. 83 (E.D. Va. 1996) 15, 18

United States v. Kimball Foods, Inc.,
440 U.S. 715 (1979).....12

Wallis v. Pan American Petroleum Corp.,
384 U.S. 63 (1966) 10, 12

WAMCO III, Ltd. v. First Piedmont Mortgage Corporation,
856 F. Supp. 1076 (E.D. Va. 1994) 7, 14-18

Statutes and Rules

12 U.S.C. § 1821 ..... 1, 3, 7, 8, 15

28 U.S.C. § 1257(a) 1

Va. Code § 8.01-246 18

Va. Code § 8.3-122 17

Rule 3:3, Rules of the Virginia Supreme Court 3

Other

135 Cong. Rec. S10205 (daily ed. August 4, 1989) 7

6A C.J.S. Assignment § 76 17

Hawkland & Lawrence UCC Series § 3-201:02 (Art. 3) ... 17

PETITION FOR WRIT OF CERTIORARI

Thomas E. Horton respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review a decision of the Supreme Court of Virginia on this important issue of federal law.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia giving rise to this petition is heretofore unpublished, but is reprinted at App. A-1 through A-11. A letter opinion of the Circuit Court for the County of Fairfax, Virginia, is also unpublished, but is reprinted at App. A-12 through A-17.

JURISDICTION

The opinion of the Supreme Court of Virginia, entered on November 1, 1996, decides an issue arising under the statutes of the United States. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED IN THE CASE

I. Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(14).

> (14) Statute of limitations for actions brought by conservator or receiver
>
> (A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be --

(i) in the case of any contract claim, the longer of --

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law;

* * *

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of --

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

STATEMENT OF THE CASE

Petitioner Thomas E. Horton (hereinafter "Dr. Horton") executed a demand note on June 8, 1989, in connection with a loan obtained from Federal Savings Bank of Virginia, F.S.B. The demand note, on its face, provided that $80,000.00 principal is due "ON DEMAND, BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990." App. A-37.

Union Recovery Limited Partnership ("Union") filed an action to recover on the demand note in the Circuit Court for the County of Fairfax on August 30, 1995. According to the motion for judgment[1] filed by Union, "[t]he Resolution Trust Corporation ('RTC') . . . acquired all right, title and interest in the Note . . . when it was appointed Receiver for the Federal Savings Bank of Virginia, F.S.B., on or about April 10, 1992." App. A-28.

The motion for judgment stated further that "[t]he RTC, as Receiver for the Federal Savings Bank of Virginia, F.S.B., has assigned all right, title, and interest in the Note. . . to plaintiff Union." App. A-28. An endorsement on the demand note indicates that the assignment by the RTC to Union actually occurred on June 26, 1995. App. A-45, 46.

Union alleged in its motion for judgment that under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(14), and related case law, Union had six years from the date the RTC was appointed receiver for Federal Savings Bank of Virginia to bring its action. App. A-28, 29.

---

[1] Under the Rules of the Virginia Supreme Court, a civil action is commenced by filing in the clerk's office a "motion for judgment." Va. Sup. Ct. Rule 3:3. The motion for judgment is the procedural equivalent of a complaint under the Federal Rules of Civil Procedure.

Dr. Horton responded to the motion for judgment by filing a plea of the statute of limitations. App. A-56 through 60. Dr. Horton argued that the action was time-barred under Virginia law, contending that the five-year statute of limitations applicable to written contracts under Virginia law governed and that Union's action on the demand note accrued upon execution of the instrument. Under applicable Virginia law, the period for bringing the action on the note expired on June 8, 1994. App. A-5. Union has never disputed that the time for bringing the action under Virginia's statute of limitations expired prior to filing of the action.

Dr. Horton further argued that the six-year limitation period under FIRREA, upon which Union relies in bringing its action on the note, applies only to the Resolution Trust Corporation ("RTC") suing in its capacity as receiver for a failed financial institution, and not to assignees of the RTC.

The trial court entered judgment in favor of Dr. Horton on the plea of the statute of limitations on November 17, 1995. App. A-19.

Union filed a motion for reconsideration on November 29, 1995, arguing that recent amendments to the Uniform Commercial Code, as adopted in Virginia, supported its contention that the FIRREA statute of limitations governed this action. On December 4, 1995, the trial court issued a written opinion, which set forth the rationale underlying the court's decisions to sustain Dr. Horton's plea of the statute of limitations and deny Union's motion for reconsideration. App. A-12 through A-17.

Union petitioned the Supreme Court of Virginia, seeking to appeal the trial court determination of the following question:

> Where a federally insured financial institution has failed, the RTC has been appointed receiver for the institution, and the RTC has

assigned a note executed in favor of the failed bank to an assignee, does the assignee stand in the shoes of the RTC with respect to the expanded statute of limitations set forth in FIRREA so that the assignee may enforce the note?

The Virginia Supreme Court granted Union's petition for appeal. After briefing and oral argument of the federal law issue, the Virginia Supreme Court reversed the trial court's ruling that the FIRREA statute of limitations is applicable by its plain language only to the RTC in its capacity as receiver. The opinion of the Virginia Supreme Court was entered on November 1, 1997. App. A-1 through A-11.

REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT OPINION DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT REGARDING STATUTORY CONSTRUCTION OF THE FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT ("FIRREA") AND OTHER COMPLEX FEDERAL LEGISLATION.

At issue in Union's appeal to the Virginia Supreme Court was the proper statutory construction of the six-year statute of limitations under FIRREA, applicable by express terms only to actions brought by the RTC in its capacity as receiver to enforce contracts on behalf of failed financial institutions.

The Virginia Supreme Court ignored established principles of proper statutory construction, despite opinions

of the United States Supreme Court which articulate clear guidelines applicable to complex federal legislation, specifically FIRREA. Following the flawed analysis of other courts that have addressed this issue, the Virginia Supreme Court concluded that the FIRREA statute of limitations creates in the receiver for failed financial institutions (FDIC or RTC) an assignable contract right to enforce an instrument beyond the state law limitation period, irrespective of the fact that the statutory power is plainly conferred upon the receiver by virtue of its status with respect to the receivership and does not purport to create additional contract rights.[2]

A. The Virginia Supreme Court Opinion Disregards the Plain Language Rule.

Judicial construction of federal legislation necessarily begins with the plain language of the statute. Demarest v. Manspeaker, 498 U.S. 184, 187 (1991) ("In deciding a question of statutory construction, we begin of course with the language of the statute."). "The meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470 (1917). By its plain language, the FIRREA statute of limitations is applicable to the RTC when it brings an action as receiver for a failed financial institution, but does not apply to assignees of the RTC.[3]

---

[2] The FIRREA statute of limitations uses the phrase "[n]otwithstanding any provision of any contract . . . ," rather than "in addition to any provision of any contract . . ." or other language which would suggest that the statute was intended to broaden the body of rights associated with contract.

[3] A plain language interpretation of the FIRREA statute of limitations is wholly consistent with its legislative history, which is summarized in a statement by Sen. Riegle that the provision

The trial court correctly applied the "plain language" rule when it observed in its letter opinion dated December 4, 1995, "[t]he plain language of the RTC Statute applies only to actions brought by the RTC as receiver and is silent on whether the statute applies to assignees of the RTC." App. A-14. The judgment of the trial court is consistent with the plain language of 12 U.S.C. § 1821(d)(14). The trial court refused to wade into the murky waters of judicial legislation, stating "the fundamental underpinning of Wamco . . . is, that Bledsoe and similar cases ignore the plain language of the RTC Statute:

> It is no doubt true that there are valid policy reasons which can be advanced for interpreting the statute in another fashion. However, that is a matter for the legislature, not for the courts, and where, as here, Congress has spoken plainly to confer a benefit on a particular entity functioning in a particular status, it is not for the courts to assess the various policy considerations which would support having the statute to provide otherwise."

App. A-16, 17 (quoting WAMCO III, Ltd. v. First Piedmont Mortgage Corporation, 856 F. Supp. 1076, 1087-88 (E.D. Va. 1994)); accord O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S. Ct. 2048, 2054 (1994) (matters left unaddressed

---

"significantly increase[s] the amount of money that can be recovered by the Federal Government through litigation . . ." 135 Cong. Rec. S10205 (daily ed. August 4, 1989) (emphasis added). The legislative history regarding the limitation period clearly contemplates enforcement of contracts by the receiver through litigation, but does not contemplate liquidation of commercial paper by the receiver at a substantial discount in secondary markets.

in a comprehensive and detailed statutory scheme "are presumably left subject to the disposition provided by state law"). Because the trial court ruling is consistent with the plain language of FIRREA, the judgment of the trial court was correct as a matter of federal law and consistent with the proper rules of statutory construction applicable to FIRREA.

The opinion of the Virginia Supreme Court does not address the issue of the plain language of 12 U.S.C. § 1821(d)(14). Instead, the Virginia Supreme Court cites a series of cases in which courts have either ignored, or improperly applied, established principles of statutory construction to expand the FIRREA statute of limitations beyond its stated applicability. The principal cases upon which the Virginia Supreme Court relies -- Mountain States, Fall v. Keasler, and Bledsoe -- each has held that assignees of the RTC are governed by the FIRREA statute of limitations. FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993); Mountain States Financial Resources Corp. v. Agrawal, 777 F. Supp. 1550 (W.D. Okla. 1991); Fall v. Keasler, No. C-90-20643-SW (ARB), 1991 WL 340182 (N.D. Cal. 1991). Other cases cited in the Virginia Supreme Court opinion add little insight to the underlying rationale of the opinion, except that those cases follow the Bledsoe triumvirate to the same faulty conclusion regarding construction of complex federal legislation.

The Bledsoe cases purport to find authority for an overly-expansive construction of the FIRREA statute of limitations in: (1) the common law of assignments; (2) public policy; and (3) the D'Oench, Duhme doctrine. The faulty foundation of Bledsoe is shaken to dust by the sound principles of statutory construction enunciated by the United States Supreme Court in the recent opinion in O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S. Ct. 2048 (1994), which the Virginia Supreme Court declined to consider in its opinion.

B. The Virginia Supreme Court Opinion Fails to Address the Decision of the United States Supreme Court in O'Melveny & Myers v. FDIC.

The opinion of the United States Supreme Court in O'Melveny & Myers articulates principles of statutory construction applicable to FIRREA that undermine the rationale of the Bledsoe line of cases in each of the three areas of analysis. Thus, the reliance upon Bledsoe and similar cases by the Virginia Supreme Court is grossly misplaced.

In O'Melveny & Myers, the FDIC, acting in its capacity as receiver for a failed financial institution, had filed suit against a law firm alleging state law causes of action for professional negligence and breach of fiduciary duty arising out of allegedly fraudulent conduct. The law firm moved for summary judgment, arguing that knowledge of the alleged fraudulent conduct by officers of the failed institution must be imputed to the institution and, therefore, to the FDIC as its receiver. The law firm contended that a state law rule of decision should govern the issue of "imputed knowledge," while the FDIC argued that a federal common-law rule of decision should govern in order to be consistent with the federal policy and interest behind FIRREA. The trial court entered summary judgment in favor of the law firm, but the Ninth Circuit reversed based on an analysis similar to the Bledsoe cases. FDIC v. O'Melveny & Myers, 969 F.2d 744, 751-52 (9th Cir. 1992), rev'd, ___ U.S. ___, 114 S. Ct. 2048 (1994).

The United States Supreme Court granted certiorari and reversed the Ninth Circuit, holding that state law rules govern issues unaddressed by Congress in comprehensive and detailed statutory schemes such as FIRREA. The opinion of Justice Scalia noted that the circumstances under which courts should engage in "judicial creation of a special

federal rule" (as courts in the Bledsoe line of cases have done) are "few and restricted." O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S. Ct. 2048, 2055 (1994). The opinion further articulated specific guidelines for proper construction of federal statutes, which amplify the shortfalls of the Bledsoe cases.

1. "There is no federal general common law."

Justice Scalia, speaking for a unanimous Court, rejected the FDIC argument that the Court should fashion a federal common-law rule of decision in light of the policy interests behind FIRREA, stating unequivocally that "[t]here is no federal general common law." O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2053 (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)). Only in "few and restricted" cases should the court create special federal rules of decision where Congress has not addressed the issue expressly. Such cases are "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'" O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966)).

The principles articulated by the United States Supreme Court in O'Melveny & Myers are in direct conflict with the approach followed by the Fifth Circuit in Bledsoe and the Virginia Supreme Court in the opinion below The Virginia Supreme Court based its conclusions regarding construction of the FIRREA statute of limitations on the statement in Bledsoe that "[i]t is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of the common law." App. A-10 (citing Bledsoe, 805 F.2d at 810). The Bledsoe court recognized that the FIRREA statute of limitations provision is silent as

to assignees of the FDIC (or RTC). Id. However, the court then leaped to the conclusion that silence should be interpreted as a statutory gap to be filled by federal common law, thereby displacing the applicable state law rule of decision without further consideration. Addressing this precise issue of whether it is within the power of the court to supplant state law with a federal common-law rule of decision where Congress has not expressly so provided, Justice Scalia stated:

> In answering the central question of displacement of [state] law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed [by Congress] in such a scheme are presumably left subject to the disposition provided by state law.

O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2054 (emphasis added) (citing Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 97 (1981) and Milwaukee v. Illinois, 451 U.S. 304, 319 (1981)); accord A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454, 1459 (D.C. Cir. 1995) ("Simply put, we have no warrant to expand what little federal common law of necessity fills the interstices of our federated legal system -- especially in an area where the Congress has legislated to some extent yet stopped short of supplanting a well-developed body of state law.").

The proper approach for the Bledsoe court to follow, where the court had determined that the issue of assignees had not been addressed by Congress in the context of the FIRREA statute of limitation, would have been to apply the

state law rule of decision. This is precisely what the Circuit Court for Fairfax County did in sustaining Dr. Horton's plea of the statute of limitations. Unlike the opinion of the Virginia Supreme Court, the judgment of the trial court was consistent with the principles articulated by the United States Supreme Court in O'Melveny & Myers.

2. There is "no significant conflict with an identifiable federal policy or interest" to justify displacement of state law rules of decision.

Having recognized that there are "few and restricted" cases which may justify "judicial creation of a special federal rule," the United States Supreme Court explained that in order to warrant a judicial endeavor into the realm of law-making, there must exist a "significant conflict between some federal policy or interest and the use of state law." O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)). "Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision." O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055 (citing Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991); Boyle v. United Technologies Corp., 487 U.S. 500, 508 (1988); and United States v. Kimball Foods, Inc., 440 U.S. 715, 728 (1979)). The Court expressly rejected the same arguments urged here by Union, and upon which the courts in the Bledsoe cases rely, that there is a substantial financial interest in fashioning a "special federal rule of decision" to accommodate assignees of the RTC. O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055 ("Our cases have previously rejected 'more money' arguments remarkably similar to the one made here."). In the Court of Appeals decision reversed by the United States Supreme Court in O'Melveny & Myers, the

Ninth Circuit had observed, in fashioning a federal common-law rule of decision under a rationale identical to the public policy argument of the Bledsoe cases, that:

> Also significant is the fact that the receiver becomes the bank's successor as part of an intricate regulatory scheme designed to protect the interests of third parties who also were not privy to the bank's inequitable conduct. That scheme would be frustrated by imputing the bank's inequitable conduct to the receiver, thereby diminishing the value of the asset pool held by the receiver and limiting the receiver's discretion in disposing of the assets. [citations omitted]"

FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1991), reversed, ___ U.S. ___, 114 S. Ct. 2048 (1994) (emphasis added). These policy arguments were flatly rejected by the Supreme Court in O'Melveny & Myers as insufficient federal interests to warrant judicial creation of a special federal rule of decision to supersede the otherwise applicable state law rule of decision. The United States Supreme Court concluded, after a lengthy discussion of the FDIC's public policy arguments, that "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2056; accord RTC v. Young, 93 Civ. 6531 (LMM), 1996 U.S. Dist. LEXIS 5916, *3 (S.D.N.Y. 1996) ("No federal interest more compelling than those unsuccessfully invoked in O'Melveny has been argued in the present case. Thus, state law governs the questions currently before this Court.").

3. The United States Supreme Court rejected the Ninth Circuit's application of D'Oench, Duhme to create federal law where state law governs.

Much like the Bledsoe cases, the Ninth Circuit in FDIC v. O'Melveny & Myers looked to the D'Oench, Duhme doctrine[4] as justification for ignoring applicable state law rules of decision in favor of creating a federal rule of decision based on common law principles. FDIC v. O'Melveny & Myers, 969 F.2d at 751. The Ninth Circuit cited D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), as authority for its broad statement that "[i]t is now clear beyond doubt that federal, not state, law governs the application of defenses against FDIC." Id. at 751 and n.9. Concluding that a state law rule of decision did in fact govern, Justice Scalia rejected the Ninth Circuit's reliance on D'Oench, Duhme to justify its judicial creation of a federal rule of decision to displace applicable state law. O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055-56. The United States Supreme Court's unwillingness to accept the D'Oench, Duhme doctrine as unrestricted license for courts to fashion court-made federal common-law rules casts a pall over the rationale of the Bledsoe cases and their reliance on D'Oench, Duhme.

---

[4] The D'Oench, Duhme doctrine is based on the narrowly-framed policy that federal agencies are able to properly perform their supervisory and insurance functions effectively only if they are able to rely on the books and records of the failed financial institution. See, e.g., CMF Virginia Land, L.P. v. Brinson, 806 F. Supp. 90, 92-93 (E.D. Va. 1992). The doctrine, and its codification at 12 U.S.C. § 1823(e), are limited to the avoidance of secret agreements unknown to the receiver. The issue before this Court does not involve undisclosed agreements, nor can a statute of limitations be properly categorized as such. See, e.g., WAMCO, 856 F. Supp. at 1087 n.12.

A recent case in the United States District Court for the Eastern District of Virginia likewise rejects the expansive reach the Bledsoe cases have attributed to D'Oench, Duhme. In RTC Commercial Loan Trust v. Winthrop Mgt., 923 F. Supp. 83, 86 (E.D. Va. 1996), The Honorable Richard L. Williams considered whether D'Oench, Duhme should be extended "not only to the secret agreement context, but also to allow assignment of the right to sue in federal court under § 1821(d)(17)(A)."[5] The Court rejected the rationale of the Mountain States and Bledsoe cases, which "appear to hold that D'Oench, Duhme is a carte blanche to allow assignment of RTC's FIRREA rights." Id. at 87. The Court noted that the Eastern District of Virginia had "rejected this expansive trend, at least with respect to the [FIRREA] statute of limitations." Id. Turning to the opinion in WAMCO, the Court stated that "while the RTC may assign its rights, it may not assign its status as a federal entity - it may not deputize a private party with the full powers of RTC." Id.

As in O'Melveny & Myers and WAMCO, the Court refused to extend D'Oench, Duhme beyond the "secret agreement context," stating:

> [An assignee of the RTC] stands in the shoes of the original lender. Only in the secret agreement context would it stand completely in RTC's more comfortable shoes.
>
> While it is a fundamental maxim of common law that the assignee stands in the

---

[5] Judge Williams appears to have identified the "slippery slope," which the Bledsoe court failed to recognize or, at least, address. If the FIRREA statute of limitations creates an assignable right in the receiver (FDIC or RTC), then the same argument can be made as to any other so-called "right to enforce" granted to the receiver under FIRREA, such as the right to enforce the contract in federal court.

> shoes of the assignor, certain rights are purely personal and cannot be assigned.

Id. at 88. The Court held that "where RTC assigns claims unrelated to secret agreements, the rule of D'Oench, Duhme does not sanction the assignment of RTC's right to sue in federal court." Id. The Court made it abundantly clear that its decision "reaffirms and extends the rationale of WAMCO, III, Ltd. v. First Piedmont Mortgage Corp." Id.

C. The Trial Court Properly Relied on the WAMCO Decision.

The facts presented to the trial court were legally and factually indistinguishable from the case decided by The Honorable Robert E. Payne in WAMCO. In WAMCO, a demand note and guaranty were executed on October 7, 1987. On December 13, 1991, the RTC was appointed receiver for the financial institution that held the demand note and guaranty. On June 30, 1992, the RTC assigned the demand note and guaranty to a third party. The assignee filed an action to recover on the demand note and guaranty on October 7, 1993. The court ruled that under Virginia law, the causes of action on the demand note and guaranty accrued on the date the instruments were signed. Applying the Virginia five-year statute of limitations applicable to written contracts, the court held that the action of the assignee was time-barred.

Like Union, the assignee in WAMCO argued that it should be given the benefit of the FIRREA six-year statute of limitations, but the WAMCO court rejected that argument based on the plain language of the statute. Judge Payne concluded that the right to bring an action within the six-year limitation period under FIRREA is "a right conferred upon RTC solely in its status as receiver and clearly personal to it when, and only when, acting in that status, it files an action."

WAMCO, 856 F. Supp. at 1087. The court observed that the "RTC, as receiver, did not institute this action and hence the six-year statute of limitations in FIRREA does not apply here." Id. The WAMCO court refused to follow the flawed reasoning of the Bledsoe line of cases, pointing out that the Bledsoe court and others, in looking to the common law of assignments to create a federal rule of decision, have overlooked the established principle in the common law of assignments that "personal rights" of an assignor do not transfer to an assignee.[6]

Like WAMCO, Union's action in the trial court sought recovery on a demand note and guaranty. Under Virginia law, a cause of action to recover on a demand note accrues on the date of the instrument or, if no date is stated, on the date of issue. Va. Code § 8.3-122(1)(b); accord Guth v. Hamlet Associates, Inc., 230 Va. 64, 72, 334 S.E.2d 558, 563-64 (1985) ("A demand note matures and is payable at once, and interest and the statute of limitations begin to run on that date."). The demand note executed by Horton bears a date of June 8, 1989, which as a matter of Virginia law is the date the cause of action accrued. A cause of action to recover on a demand note is an action on a written contract and, therefore, the applicable limitation period in which to bring an action on a demand note is five years. Va. Code § 8.01-246(2); WAMCO, 856 F. Supp. at 1083. The limitation

---

[6] The Virginia Supreme Court does not address the issue of the assignability of "personal rights." However, there is no authority to suggest that the common law in Virginia differs from the principles articulated in WAMCO. WAMCO, 856 F. Supp. at 1086-87 (quoting 6A C.J.S. Assignment § 76 and Hawkland & Lawrence UCC Series § 3-201:02 (Art. 3)). In fact, a Virginia Supreme Court Justice once observed that it is the law in Virginia that defenses which are "purely personal" to an assignor of an obligation may not be available to an assignee as against the original obligee. See Linbrook Realty Corp. v. Rogers, 158 Va. 181, 191, 163 S.E. 346, 349 (1932) (Epes, J., concurring).

period applicable to Union for bringing an action on the demand note executed by Horton expired on June 8, 1994, five years from the date of the demand note. Union filed its action on August 30, 1995, more than a year after the applicable limitation period had expired. In light of the above, the trial court properly ruled that Union's action was time-barred under Virginia law.

II. THIS PRECISE ISSUE IS PENDING IN THE FOURTH CIRCUIT AND THERE IS A SUBSTANTIAL POSSIBILITY OF A SPLIT IN AUTHORITY.

There are at least two other instances in which federal district court judges sitting within the Fourth Circuit have adopted the reasoning of WAMCO, one of which is discussed, supra. In that case out of the Richmond Division of the Eastern District of Virginia, The Honorable Richard L. Williams "reaffirm[ed] and extend[ed] the rationale of WAMCO . . . ". RTC Commercial Loan Trust, supra, at 88 (E.D. Va. 1996). In another case out of the Alexandria Division of the Eastern District of Virginia, Federal Financial Co. v. Hall, Civ. Action No. 95-1600-A (Dec. 29, 1995) (unreported), The Honorable James C. Cacheris followed WAMCO in a case factually similar to the instant case.

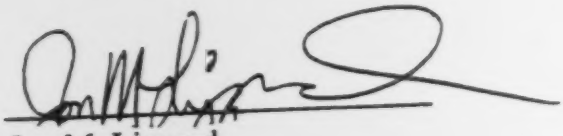
The Federal Financial case is presently on appeal to the United States Court of Appeals for the Fourth Circuit (Record No. 96-1143) on precisely this same issue. As of this date, the Fourth Circuit has not ruled on the issue. However, if the decision of the district court is upheld, there will not only be a split of authority between the circuits, but conflicting decisions between the Fourth Circuit and the Virginia Supreme Court. This petition, if granted, will avoid the confusion that will unavoidably occur if the Fourth

Circuit properly applies the principles of O'Melveny & Myers to this issue.

CONCLUSION

For the foregoing reasons, this Court should grant the Petitioner's Writ of Certiorari.

Date: January 28, 1997



Jon M. Lippard
Counsel of Record
JON M. LIPPARD, P.C.
314 Commerce Street, First Floor
Alexandria, Virginia 22314

FILED

No. 961296 JAN 30 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

THOMAS E. HORTON,

Petitioner,

v.

UNION RECOVERY LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Appendix to Petition for Writ of Certiorari

Jon M. Lippard*
JON M. LIPPARD, PC
First Floor
314 Commerce Street
Alexandria, VA 22314
(703) 836-8723

Counsel of Record
Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

63 pp

TABLE OF CONTENTS

Appendix to Petition

Appendix Page

Opinion,
Virginia Supreme Court,
entered November 1, 1996 ..... A-1

Letter Opinion,
Fairfax County Circuit Court
entered December 4, 1995 ..... A-12

Order,
Denying Motion to Reconsider,
Fairfax County Circuit Court,
entered December 5, 1995 ..... A-18

Order,
Dismissing Motion for Judgment,
Fairfax County Circuit Court,
entered November 17, 1995 .... A-19

Written Statement of Facts
and Other Incidents of the
Case Pursuant to Rule 5:11,
Fairfax County Circuit Court,
filed January 30, 1996 ..... A-21

Motion for Judgment,
Fairfax County Circuit Court,
with attachments,
filed August 30, 1995 ..... A-25

ATTACHMENTS:

Affidavit of
William B. Buland,
filed August 30, 1995 ... A-32

Promissory Note,
dated June 8, 1989 ..... A-35

Guaranty,
dated June 8, 1989 ..... A-47

Plea of the Statute
of Limitations,
Fairfax County Circuit Court,
filed August 30, 1995 ..... A-56

VIRGINIA SUPREME COURT

UNION RECOVERY LIMITED PARTNERSHIP,

Appellant,

v.

THOMAS E. HORTON, et al.

Appellees.

Record No. 960329

Appeal from the
Circuit Court of Fairfax County
M. Langhorne Keith, Judge

Entered: November 1, 1996

Present: all the Justices

Reversed and Remanded

OPINION BY JUSTICE L. KOONTZ, JR.:

In this appeal we consider whether an assignee of a promissory note from the Resolution Trust Corporation (RTC) is entitled to the benefit of the statute of limitations available under federal law to RTC as receiver of the insured

depository institution which originally held the note. Adhering to the common law rule that an assignee acquires the rights of the assignor, we hold that the federal statute controls the limitations period.

BACKGROUND

The facts of the case are not in dispute. On June 8, 1989, Thomas E. Horton executed a promissory note in favor of Federal Savings Bank of Virginia, F.S.B. (Federal) in the principal amount of $80,000. A variable rate of interest was payable monthly on the note from August 1, 1989, and the principal was due "ON DEMAND, BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990." Robert J. Leipzig executed a partial guaranty of the note in the amount of $20,000.

Sometime prior to April, 1992, Horton defaulted on the note and Leipzig defaulted on the guaranty. On April 10, 1992, RTC was appointed receiver for Federal and assumed control of its assets, including the note and guaranty at issue. On June 26, 1995, RTC assigned the note and guaranty to Union Recovery Limited Partnership (Union Recovery).

On August 30, 1995, Union Recovery filed a motion for judgment against Horton and Leipzig to recover on the note and guaranty. Within the motion for judgment, Union Recovery asserted the

applicability of the six-year statute of limitations afforded to RTC under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). 12 U.S.C. §1821(d)(14)(A)(i). Both Horton and Leipzig filed pleas in bar contesting the application of the federal limitations period and asserting that any action on the note was barred by the running of the five-year statute of limitations provided for under Code §8.01-246(2), which they alleged was the applicable state statute of limitations.

The parties filed briefs in support of their respective positions and presented argument to the trial court. By order entered November 17, 1995, the trial court sustained the pleas of the statute of limitations and dismissed the motion for judgment with prejudice.

Union Recovery filed a motion for reconsideration. In an opinion letter dated December 5, 1995 and adopted by reference in a subsequent order denying the motion for reconsideration, the trial court set forth the grounds for its decision. Citing WAMCO, III, Ltd. v. First Piedmont Mortgage Corp., 856 F.Supp. 1076 (E.D. Va. 1994), the trial court held that the statute of limitations provided for in FIRREA was a right applicable only for suits brought by government chartered corporations. As such, the trial court reasoned, the right was personal to RTC, and Union Recovery could acquire only those rights RTC had

under the note and guaranty instruments, not those which RTC had by virtue of its status as a receiver under FIRREA. We awarded Union Recovery an appeal.

APPLICATION OF STATE AND FEDERAL STATUTE OF LIMITATIONS PERIODS

Virginia Statute of Limitations

The note and its associated guaranty were executed in 1989 prior to the enactment of Title 8.3A, and, accordingly, this case is governed by the rules found in superseded Title 8.3. The parties have consistently treated the note as a pure demand note although it provided for a specific payment date if no demand was made. Under the provisions of Code §8.3A-108(c), absent a demand, a note of this type becomes payable at a definite time on the fixed date with the cause of action accruing on that date. Because the issue is not relevant to the ultimate determination of this appeal, we will assume, without deciding, that the parties have correctly applied the rules of superseded Title 8.3 in their treatment of the note as a pure demand note. Under former Code §8.3-122(1)(b), the cause of action on a pure demand note accrued upon its execution. Formerly, demand notes were subject to the five-year statute of limitations applicable to contracts generally. Code

§8.01-246(2).* Accordingly, Federal was required to sue on the note before June 8, 1994 to avoid an effective plea in bar of the statute of limitations.

Federal Statute of Limitations under FIRREA

FIRREA, Pub. L. No. 101-72, 103 Stat. 277 (1989)(codified in disconnected sections of Titles 12 and 15 of the U.S. Code), governs the procedures under which federally chartered corporations acting as agents of the United States become receivers or conservators of failed federally insured financial institutions. Its principal application is to the Federal Deposit Insurance Corporation (FDIC). However, when acting as receiver of an insured depository institution, RTC is deemed to be an agent of the United States. 12 U.S.C. §1441a(b)(1)(A). As such, RTC, as receiver, has the same rights and powers as does FDIC under FIRREA. 12 U.S.C. §1441a(b)(4)(A). Thus, although created for different purposes, RTC and FDIC are in all respects identically situated when acting as receivers in the name of the United States under FIRREA.

---

*Title 8.3A now provides for a six-year statute of limitations on most forms of negotiable instruments. Code § 8.3A-118.

The relevant portions of FIRREA applicable to this appeal are found at 12 U.S.C. §1821(d)(14)(A) and (B):

> (A) In general.
>
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be--
>
> (i) in the case of any contract claim, the longer of--
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law;
>
> . . . .
>
> (B) Determination of the date on which a claim accrues.
>
> For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of--

(I) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

When RTC acquired the note and guaranty as receiver, it was entitled under FIRREA to institute actions on them under the longest period provided by the combined application of subsections A and B of 12 U.S.C. §1821(d)(14). Under the provisions of subsection B, RTC was permitted to advance the date of accrual of the causes of action to April 10, 1992, the date of its appointment as receiver. It was further permitted to take the six-year statute of limitations of subsection A over the five-year statute of limitations available under state law. Accordingly, RTC had until April 9, 1998 to sue upon the note and guaranty.

DISCUSSION

It is well established law in Virginia that an assignee obtains his rights from the assignor, and, thus, he is said to "stand in the shoes" of the assignor when pursuing an action on the contract or instrument assigned. See, e.g., National Bank and Trust Company at Charlottesville v. Castle, 196 Va. 686, 692-93, 85 S.E.2d 228, 232 (1955). Thus,

the sole question in this appeal is whether the statute of limitations contained in 12 U.S.C. §1821(d)(14)(A) and (B) applies to assignees of RTC, or do these assignees take their assignments subject only to the rights which would have accrued to the failed institution for which RTC is acting as receiver, thus becoming de facto assignees of the institution.

In Mountain States Financial Resources Corp. v. Agrawal, 777 F.Supp. 1550 (W.D. Okla. 1991), the first reported case to address the application of FIRREA's statute of limitations provisions to an assignee of an agent corporation of the United States, the court held that the federal statute of limitations applied to an assignee of FDIC. Id. at 1552. The court reasoned that:

> An assignee stands in the shoes of the assignor, and acquires all of the assignor's rights and liabilities in the assignment. This general principle and a strong public policy require that the FDIC's assignee acquire the six-year limitations period provided by §1821(d)(14)(A).

Id.

Several courts have relied on the reasoning in Mountain States to extend to

assignees of FDIC the six-year statute of limitations provided by 12 U.S.C §1821(d)(14)(A)(i). See, e.g., F.D.I.C. v. Bledsoe, 989 F.2d 805 (5th Cir. 1993); Remington Investments, Inc. v. Kadenacy, 930 F.Supp. 446 (C.D. Cal. 1996); White v. Moriarty, 19 Cal. Rptr. 2d 200 (Cal. Ct. App. 1993); Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244 (Colo. 1994); Cadle Co. II, Inc. v. Lewis, 864 P.2d 718 (Kan. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1613 (1994); Central States Resources Corp. v. First National Bank, 501 N.W.2d 271 (Neb. 1993). In addition, a recent decision of the Appellate Court of Illinois has applied this same reasoning to a suit brought by an assignee of RTC. Twenty First Century Recovery, Ltd. v. Mase, 665 N.E.2d 573 (Ill. Ct. App. 1996).

Disagreeing with the majority view, the court in WAMCO, the decision relied on by the trial court in this case, held that the five-year Virginia statute of limitations applied to a demand note assigned by RTC to WAMCO. WAMCO, 856 F.Supp. at 1088. In its analysis the court found that the statute plainly conferred the benefit of the six-year limitation on RTC in its status as receiver. As such, the court reasoned that the benefit is personal and, therefore, does not transfer to an assignee under existing common law rule. Id. at 1086. The court further found that public policy alone could not supply

the right where the statute was silent. Id.

We do not concur in the view expressed in WAMCO and adopt the view taken by the majority of other federal and state jurisdictions. We find that application of the common law, even without reference to the public policy this would promote, mandates the application of the longer limitations period. As expressed by the United States Court of Appeals for the Fifth Circuit in Bledsoe, we hold that where "statutes are absolutely silent on [a] matter[, i]t is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of the common law." Bledsoe, 989 F.2d at 810.

The extended statute of limitations is merely a mechanism for providing the receiver with an adequate time to pursue those claims which the financial institution could not successfully pursue prior to its failure. As such, the receiver's right to sue within the statute of limitations period is inherent in its possession of the instruments at issue and would thus be among the "rights, remedies and benefits which are incidental to the thing assigned," WAMCO, 856 F.Supp. at 1086, and not merely a right "personal to the assignor and for [its] benefit only." Id. (citation omitted).

For these reasons, we will reverse the order of the trial court dismissing the motion for judgment and remand the case for further proceedings.

Reversed and remanded

Letter Opinion

Entered: December 4, 1995

Robert M. Cary, Esquire
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005

Jon M. Lippard, Esquire
Jon M. Lippard, P.C.
First Floor
314 Commerce Street
Alexandria, Virginia 22314

Sean C. E. McDonough, Esquire
Grad, Logan & Klewans, P.C.
112 North Columbus Street
PO Box 1417-A-44
Alexandria, Virginia 22313

Re: Union Recovery L.P.
v. Horton, et al.
At Law No. 144826

Dear Counsel:

On November 17, 1995 the Court sustained Defendants' Pleas in Bar based on Virginia's five-year statute of limitations. On November 29, 1995 Plaintiff, Union Recovery Limited Partnership ("Union"), moved the Court to reconsider its decision. For the reasons set forth below, the Court declines to reconsider.

The issue in this case is whether the six-year statute of limitations provided for in 12 U.S.C. §1821 (d)(14) (the "RTC Statute") or the five-year statute of limitations set forth in Va. Code Ann. §8.01-246.2 (the "Virginia Statute"), controls in this suit on a note made by Defendant Horton and guaranteed by Defendant Leipzig. The Resolution Trust Corporation ("RTC") assigned the $80,000.00 note ("Note") to Union. The Note provides that it is payable "on demand, but if no demand is made then on July 1, 1990." Thus under applicable Virginia law, the statute of limitations began running on July 2, 1990. Va. Code Ann. §8.3-122(a).[1] Union filed its suit on August 30, 1995 and if the Virginia Statute applies, Union's lawsuit is barred.

The RTC Statute provides that "the applicable statute of limitations with regard to any action *brought by* the Corporation [FDIC] as conservator or receiver" (emphasis added), shall be the longer of six years beginning on the date the claim accrues or the limitations period applicable under state law. 12 U.S.C. §1821 (d)(14)(A)(i).[2] Moreover

---

[1] Va. Code Ann. § 8.3A-118, editors note.

[2] When acting as a receiver the RTC is an agent of the United States and has the same rights and powers as the FDIC under 12 U.S.C. §§ 1821-1823. 12 U.S.C. § 1441a(b)(4)(A).

for purposes of the RTC Statute, a claim begins to run on the date the RTC is appointed as conservator or receiver or the date the cause of action accrues, whichever is later. 12 U.S.C. §1821 (d)(14)(B). The Note was payable to and held by the Federal Savings Bank of Virginia, FSB and the RTC was appointed the savings bank's receiver on April 10, 1992. Thus, the RTC would have until April 9, 1998 to bring an action on the Note and Union asserts that it "stands in the shoes" of the RTC.

The plain language of the RTC Statute applies only to actions brought by the RTC as a receiver and is silent on whether the statute applies to assignees of the RTC. Nonetheless, Union cites numerous cases wherein courts have filed in that statutory gap. Those cases hold that as an assignee stands in its assignors shoes, and public policy compels giving assignees the benefit of the RTC Statute of limitations,[3] such assignees are subject to the RTC Statute and not the applicable state limitations

---

[3] The failure to allow private transferees to take advantage of the RTC Statute, courts find, would shrink the private market for the assets of failed banks and require the RTC to hold onto assets and prosecute actions itself. *F.D.I.C. v. Bledsoe, supra* at 811; *Fall v. Keasler*, 1991 WL 340182 at page 4 (N.D. Cal); *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1250 (Colo. 1994).

period. *F.D.I.C. v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993); *Mountain States Financial Resources Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Oklahoma 1991); *Cadle Co. II, Inc. v. Stamm*, 633 So.2d 45 (Fla. Dist. Ct. App. 1994); *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993), cert denied 114 S. Ct. 1613 (1994) and *Namm Portfolio, LLC v. Kilwaiths Associates II*, (Circ. Ct. for Arlington Co., April 21, 1995) (Kendrick, J.).

The defendants rely on *Wamco, III, Ltd. v. First Piedmont Mortg. Corp.*, 856 F. Supp. 1076 (E.D. Va. 1994) which held, on facts similar to the case at bar, that Virginia's five-year statute applied. The *Wamco* decision was based on 1) the plain language of the RTC Statute, 2) the law of assignments (which the Wamco court found *Bledsoe* and other decisions had misconstrued), and 3) Va. Code. Ann. §8.3-201(1) which provided that "transfer of an instrument vests in the transferee such rights as the transferee has therein....". Citing Hawkland & Lawrence UCC Series §3-201:02, *Wamco* held that this language meant such rights as the transferor had in the instrument and not the status of the transferor, *id* at 1087.

Union argues that the UCC leg of *Wamco* has been sawn off by the January 1, 1993 changes to Article 3 of the UCC.[4]

---

[4] The note in *Wamco* was transferred in 1992 so this change was inapplicable. *Wamco, supra*, at 1087.

Va. Code. Ann. §8.3A-203 now provides that the transfer of an instrument "vests in the transferee any right of the transferor to enforce the instrument". Union asserts that one of those rights was the RTC's "right" to rely on the six-year limitations period and thus Union enjoys that right as the RTC's assignee. But the official comment to §8.3A-203 makes it clear that the change from former §8.3-201 was not intended to change the substantive law of what rights are transferable by an assignor but rather to clarify what rights a transferee can receive as a result of such transfer. Va. Code Ann. §8.3A-203, *Official Comment* at 1. In addition, even if this Court accepts Union's reading of §8.3A-203,[5] such a reading would not undermine the fundamental underpinning of *Wamco*, that is, that *Bledsoe* and similar cases ignore the plain language of the RTC Statute:

> It is no doubt true that there are valid policy reasons which can be advanced for interpreting the statute in another fashion. However, that

---

[5] Under Union's theory of the case the latest this action could have accrued is April 10, 1992 and new Article 3A of Virginia's UCC was not applicable to actions accruing before January 1, 1993.

> is a matter for the legislature, not for the courts, and where, as here, Congress has spoken plainly to confer a benefit on a particular entity functioning in a particular status, it is not for the courts to assess the various policy considerations which would support having the statute to provide otherwise.

Wamco, supra, at 1087-88.

Finally, the bald assertion that somehow a statute of limitations creates a "right" to bring an action does not bear analysis. A statute of limitation neither creates nor destroys the right of a holder of an instrument, it bars only the remedy. *School Bd. of the City of Norfolk v. U.S. Gypsum,* 234 Va. 32, 37 (1987).

For the foregoing reasons the Court concluded that Defendants' Plea in Bar was well taken and I decline to reconsider my ruling.

An order will be entered reflecting the above decision.

Very truly yours,

/s/ M. Langhorne Keith

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS E. HORTON, et al.,

Defendants.

Entered: December 5, 1995

ORDER

On November 29, 1995 Plaintiff, Union Recovery Limited Partnership, moved the Court to reconsider its decision sustaining defendant's Plea of the Statute of Limitations. For the reasons set forth in the Court's opinion of December 4, 1995 the Court declines to reconsider.

/s/ M. Langhorne Keith, Judge

Endorsement of counsel is waived pursuant to Rule 1:13.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS E. HORTON, et al.,

Defendants.

Entered: November 17, 1995

ORDER

Upon consideration of the arguments of counsel, and the briefs submitted by the respective parties in this matter, it is this 17th day of November, 1995, by the Circuit Court for the County of Fairfax, Virginia,

ORDERED, ADJUDGED AND DECREED that the respective pleas of of the statute of limitations of Defendants Thomas E. Horton and Robert J. Leipzig are sustained and the Motion for Judgment is, hereby, dismissed with prejudice.

/s/ Circuit Court Judge
County of Fairfax

WE ASK FOR THIS:

/s/ Jon M. Lippard
Jon M. Lippard (VSB No. 31748)
JON M. LIPPARD, P.C.
First Floor
314 Commerce Street
Alexandria, Virginia 22314

Counsel for Defendant
Thomas E. Horton

/s/ Sean C. E. McDonough
Sean C. E. McDonough, Esquire
GRAD, LOGAN & KLEWANS
112 N. Columbus St.
P.O. Box 1417-A44
Alexandria, Virginia 22313

Counsel for Defendant Robert J. Leipzig

SEEN:

/s/ Robert M. Cary
Robert M. Cary, Esquire
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005

Counsel for Plaintiff

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS E. HORTON, et al.,

Defendants.

Filed: January 30, 1996

WRITTEN STATEMENT OF FACTS
AND OTHER INCIDENTS OF
THE CASE PURSUANT TO RULE 5:11

Plaintiff, Union Recovery Limited Partnership ("Union"), filed a Motion for Judgment on August 30, 1995, stating a single count against Defendant Thomas E. Horton ("Horton") and an additional count against Defendant Robert J. Leipzig ("Leipzig"). The count against Defendant Horton sought to recover principal and interest allegedly due on a demand note dated June 8, 1989. The demand note was executed in connection with a loan made by Federal Savings Bank of Virginia, F.S.B., to Defendant Horton. The demand note, on its face, provided that the

principal is due "ON DEMAND, BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990." A copy of the demand note was attached as an exhibit to the Motion for Judgment. The count against Defendant Leipzig sought to recover $20,000 on an alleged guaranty of the demand note, executed contemporaneously with the demand note. A copy of the guaranty was attached as an exhibit to the Motion for Judgment.

According to the Motion for Judgment, "[t]he Resolution Trust Corporation ('RTC') ... acquired all right, title and interest in the Note ... when it was appointed Receiver for the Federal Savings Bank of Virginia, F.S.B., on or about April 10, 1992." Pl. Mot. For Judg., ¶13. The Motion for Judgment stated further that "[t]he RTC, as Receiver for the Federal Savings Bank of Virginia, F.S.B., has assigned all right, title, and interest in the Note and Guaranty to plaintiff Union." Pl. Mot. for Judg., ¶14. The demand note, attached to the Motion for Judgment, indicated that the assignment by the RTC to Plaintiff occurred on June 26, 1995. Plaintiff alleged in its Motion for Judgment that under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 "FIRREA"), 12 U.S.C. § 1821(d)(14), and related case law, Plaintiff had six years from the date the RTC was appointed receiver for Federal Savings Bank of Virginia or six years from the date its cause of action

accrued whichever is later, to bring its action. Pl. Mot. For Judg., ¶15.

This action was filed on August 30, 1995. Defendants responded to the Motion for Judgment on October 19, 1995, by filing their respective pleas of the statute of limitations. Defendants argued that the action was time-barred under Virginia law. Defendants contended that the five-year statute of limitations applicable to written contracts governed this action and that Plaintiff's action on the demand note and guaranty accrued upon execution of the demand note. According to Defendants, the period for bringing this action expired on June 8, 1994. Defendants further argued that the six-year limitation period under FIRREA, upon which Plaintiff relied, applies only to the Resolution Trust Corporation ("RTC") suing in its capacity as receiver for a failed financial institution, and not to assignees of the RTC.

The parties filed briefs on the issues raised by the respective pleas of the statute of limitations. Oral argument was heard on November 18, 1995. Upon consideration of the briefs and oral argument presented by the parties, the Court sustained Defendants' pleas of the statute of limitations on November 17, 1995. Plaintiff filed a Motion for Reconsideration on November 29, 1995, arguing that recent amendments to the Uniform Commercial Code, as adopted in Virginia, supported its contention that

the FIRREA statute of limitations governed this action. On December 4, 1995, the Court issued a written opinion, which set forth the rationale underlying the Court's decisions to sustain Defendants' pleas and denied Plaintiff's motion for reconsideration. The Court's written opinion and the remainder of the record in this case are incorporated herein by reference. For purposes of the Court's ruling on the pleas of the statute of limitation, no evidentiary hearing was necessary and the factual basis for the Court's ruling are the facts alleged in the pleadings and papers filed on behalf of the respective parties.

/s/ M. Langhorne Keith
Circuit Court Judge

Dated: January 30, 1996

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP
by UNION FINANCIAL CORPORATION,
Its General Partner,
888 Sixteenth Street, N.W., Suite 700
Washington, D.C. 20006,

Plaintiff,

v.

THOMAS E. HORTON
20 Maplewood Park Court
Bethesda, Maryland 20814-1731,

and

ROBERT J. LEIPZIG
10114 Walker Woods Drive
Great Falls, Virginia 22066-3611,

Defendants.

Filed: August 30, 1995

MOTION FOR JUDGMENT

Plaintiff Union Recovery Limited Partnership ("Union"), by undersigned counsel, for its Motion for Judgment

against the defendants alleges as follows:

PARTIES

1. The plaintiff, Union, is a limited partnership organized and existing under the laws of the State of Maryland. Its General Partner, Union Financial Corporation, is a Maryland Corporation.

2. Defendant Thomas E. Horton ("Horton"), resides at 20 Maplewood Park Court, Bethesda, Maryland 20814. He entered into the loan which is the subject of this litigation with Federal Savings Bank of Virginia, F.S.B., in Fairfax County, Virginia.

3. Defendant Robert J. Leipzig ("Leipzig") is a citizen of the Commonwealth of Virginia residing at 10114 Walker Woods Drive, Great Falls, Virginia 22066. He guaranteed a portion of the loan which is the subject of this litigation in Fairfax County, Virginia.

JURISDICTION AND VENUE

4. The Court has jurisdiction over all resident parties and over all nonresident parties pursuant to Va. Code Ann. § 8.01-328.1 (Michie 1992).

5. Venue is proper in Fairfax County pursuant to Va. Code Ann. § 8.01-262 (Michie 1992).

FACTUAL BACKGROUND

6. In June of 1989, the Federal Savings Bank of Virginia, F.S.B., 200 Little Falls Street, Falls Church, Virginia 22046, extended to defendant Horton a loan in the principal amount of $80,000, as evidenced by a promissory note dated June 8, 1989 (the "Note") (a true copy of which is attached hereto as Exhibit A and incorporated fully herein). The Note provided that the principal was due on demand or on July 1, 1990 if no demand was made.

7. The Note provided that defendant Horton was to pay interest at a variable rate, and that accrued interest was due on demand, or monthly beginning August 1, 1989 if no demand was made.

8. The Note also provided that defendant Horton would be obligated to pay attorney's fees and court costs in the event a lawyer were hired to collect the Note.

9. In June of 1989, defendant Leipzig "absolutely and unconditionally guarantee[d] to the Bank the full and prompt payment when due . . . of each and every debt, liability and obligation of every type and description which [defendant Horton] may now or at any time hereafter owe to [Federal Savings Bank of Virginia, F.S.B.] . . . . ," as evidenced by a guaranty dated June 8, 1989 (the "Guaranty") (a true copy of which is attached hereto as Exhibit B and

incorporated fully herein). The liability of defendant Leipzig under the Guaranty, however, was limited to the principal amount of $20,000, plus accrued interest thereon and all attorney's fees and other collection costs.

10. Under the terms of the Note and Guaranty, defendants Horton and Leipzig waived presentment, demand, protest, and notice of dishonor.

11. Defendant Horton has not made all of the required payments of principal and interest under the Note and is presently in default of his obligations under the Note.

12. Defendant Leipzig has not made any payments to satisfy Horton's indebtedness under the Note and is presently in default of his obligations under the Guaranty.

13. The Resolution Trust Corporation ("RTC") subsequently acquired all right, title, and interest in the Note and Guaranty, when it was appointed Receiver for the Federal Savings Bank of Virginia, F.S.B., on or about April 10, 1992.

14. The RTC, as Receiver for Federal Savings Bank of Virginia, F.S.B., has assigned all right, title, and interest in the Note and Guaranty to plaintiff Union.

15. Under the Financial Institutions, Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. §1821(d)(14), and related case law, Union

has six years from the date the RTC was appointed receiver for Federal Savings Bank of Virginia, F.S.B., or six years from the date its cause of action accrued, whichever is later, to bring the instant case of action.

COUNT I -- THE HORTON NOTE

16. Plaintiff restates and incorporates by reference the allegations contained in the preceding paragraphs.

17. As of August 25, 1995, the amount due from defendant Horton under the Note is $80,000 in principal, plus $21,705.21 in interest, plus attorney's fees in the amount of $8,000 plus court costs.

18. In addition to the foregoing, attached hereto as Exhibit C is the Affidavit of William B. Buland, Director of Asset Management of Union. The Affidavit of Mr. Buland confirms the accuracy of the foregoing facts, the authenticity of the Note and the amount owed pursuant to the Note. Accordingly, pursuant to Virginia Code §8.01-28, Union is entitled to immediate judgment against defendant Horton, without the need for further evidence, unless defendant Horton appears (or files an answer) and denies under oath the accuracy of the foregoing and denies that Union is entitled to the requested relief.

WHEREFORE, Plaintiff Union respectfully requests that this Court

enter judgment in favor of Union and against defendant Horton in the amount of $80,000 in principal, accrued interest as of August 25, 1995 in the amount of $21,705.21, and attorney's fees in the amount of $8,000, for a total of $109,705.21 plus additional interest through judgment, court costs and post-judgment interest; and grant such other relief as may be appropriate.

COUNT II -- THE LEIPZIG GUARANTY

19. Plaintiff restates and incorporates by reference the allegations contained in the preceding paragraphs.

20. As of August 25, 1995, the amount due from defendant Leipzig under the Guaranty was $20,000 in principal, plus $5,426.30 in interest, plus attorney's fees in the amount of $8,000 plus court costs.

21. In addition to the foregoing, also attached hereto as Exhibit C is the Affidavit of William B. Buland, Director of Asset Management of Union. The Affidavit of Mr. Buland confirms the accuracy of the foregoing facts, the authenticity of the Note and Guaranty and the amount owed pursuant to the Note and Guaranty. Accordingly, pursuant to Virginia Code §8.01-28, Union is entitled to immediate judgment against defendant Leipzig without the need for further evidence, unless defendant Leipzig appears (or files an answer) and denies

under oath the accuracy of the foregoing and denies that Union is entitled to the requested relief.

WHEREFORE, Plaintiff Union respectfully requests that this Court enter judgment in favor of Union and against defendant Leipzig in the amount of $20,000 in principal, accrued interest as of August 25, 1995 in the amount of $5,426.30, attorney's fees in the amount of $8,000, for a total of $33,426.30 plus additional interest through judgment, court costs and post-judgment interest; and grant such other relief as may be appropriate.

Respectfully submitted,

WILLIAMS & CONNOLLY
By: /s/ Robert M. Cary

Robert M. Cary, #32000
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Counsel for Plaintiff
Union Recovery Limited
Partnership

August 30, 1995

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP
by UNION FINANCIAL CORPORATION,
Its General Partner,
888 Sixteenth Street, N.W., Suite 700
Washington, D.C. 20006,

Plaintiff,

v.

THOMAS E. HORTON
20 Maplewood Park Court
Bethesda, Maryland 20814-1731,

and

ROBERT J. LEIPZIG
10114 Walker Woods Drive
Great Falls, Virginia 22066-3611,

Defendants.

Filed: August 30, 1995

AFFIDAVIT OF WILLIAM B. BULAND

I, WILLIAM B. BULAND, being duly sworn according to law, upon my oath, depose and say:

1. I am currently employed by Plaintiff Union Recovery Limited Partnership ("Union"), as its Director of Asset Management.

2. I have fully reviewed Union's Motion for Judgment. The facts set forth in Union's Motion for Judgment are accurate, and I hereby confirm the accuracy of the facts set forth therein.

3. I have also reviewed the Note attached to Union's Motion for Judgment as Exhibit A (the "Note") and the Guaranty (the "Guaranty") attached to Union's Motion for Judgment as Exhibit B and hereby confirm that they are authentic.

4. I also attest that the Note and Guaranty have been maintained by Union in the normal course of its business, that I am familiar with such business procedures and have personal knowledge as to the manner in which these particular documents have been maintained.

5. As of August 25, 1995, defendant Horton has paid no portion of the indebtedness stated in Union's Motion for Judgment, which totals $109,705.21 as of August 25, 1995, plus interest through judgment and court costs.

6. As of August 25,1995, defendant Leipzig has paid no portion of the indebtedness stated in the Motion for Judgment, which totals $33,426.30 as of August 25, 1995 plus interest through judgment and court costs.

I do solemnly declare and affirm under the penalties of perjury that the matters and facts as stated above are true and correct to the best of my knowledge, information and belief.

/s/ William B. Buland

Sworn to and subscribed before me this 30th day of August, 1995.

/s/ NOTARY PUBLIC

My Commission Expires: April 30, 1998

THOMAS E. HORTON
10649 Weymouth Street, #204
Bethesda, MD 20814
BORROWER'S NAME AND ADDRESS
"I" includes each borrower above, jointly and severally.

FEDERAL SAVINGS BANK OF VIRGINIA, FSB
200 LITTLE FALLS STREET
FALLS CHURCH, VA 22046
LENDER'S NAME AND ADDRESS
"You" means the lender, it successors and assigns.

Loan Number: 60-26
Date: June 8, 1989
Maturity Date: July 1, 1990
Loan Amount: $80,000.00
Renewal Of: _____

I promise to pay to you or your order at your address listed above the PRINCIPAL sum of EIGHTY THOUSAND AND NO/100 Dollars ($80,000.00)

☒ Single Advance: I have received all of this principal sum. No additional advances are contemplated under this note.

PURPOSE: The purpose of this loan is CONSUMER: PURCHASE INTO DENTAL PRACTICE.

INTEREST: I agree to pay interest (calculated on a ACTUAL/365 basis) on the

principal balance(s) owing from time to time as stated below.

☒ Variable Rate: I agree to pay interest at the initial simple rate of 13.000% per year. This rate may change as stated below.

☒ Index Rate: The future rate will be 2.000% over the following index rate: NEW YORK PRIME AS QUOTED WITHIN THE WALL STREET JOURNAL.

☒ Frequency and Timing: The rate on this note may increase as often as THE PRIME RATE CHANGES. An increase in the interest rate will take effect ON THE SAME DAY.

☒ Limitations: The rate on this note will not at any time (and no matter what happens to any index rate used) go above or below these limits:

☒ Maximum Rate: The rate will not go above N/A.

☒ Minimum Rate: The rate will not go below 9.50%.

Post-Maturity Rate: I agree to pay interest on the unpaid balance owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

PAYMENTS: I agree to pay this note as follows:

☒ Interest: I agree to pay accrued interest ON DEMAND. BUT IF NO DEMAND IS MADE MONTHLY BEGINNING AUGUST 1, 1989.

☒ Principal: I agree to pay the principal ON DEMAND. BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990.

☒ Effect of Variable Rate: An increase in the interest rate will have the following effect on the payments:

☒ The amount of each scheduled payment will be increased.

☒ The amount of the final payment will be increased.

CONFESSION OF JUDGMENT: I appoint and authorize DANIEL W. HUMBERT attorneys in

fact to, if I default on this note, appear in the office of CLERK OF CIRCUIT COURT, ARLINGTON COUNTY, VA., and confess judgment against me in the amount of any unpaid principal and interest, and costs of collection as provided in this note. SEE REVERSE SIDE FOR ADDITIONAL TERMS OF CONFESSION OF JUDGMENT.

☒ If checked, no agreement was signed today securing this note. (This section is for your internal use. It may not include every agreement or item of collateral securing this note. You will not lose any security by omitting it from this section.)

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON THE OTHER SIDE). I have received a copy on today's date.

/s/ Thomas E. Horton

ADDITIONAL TERMS

APPLICABLE LAW: The law of the state of Virginia will govern this note. Any term of this note which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation.

PAYMENTS: Each payment I make on this note will first reduce the amount I owe you for charges which are neither

interest nor principal. The remainder of each payment will then reduce unpaid earned interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this form.

INTEREST: If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal advanced at that time. If the interest rate on this note is variable, decreases in the interest rate will have the corresponding opposite effect on my payment that increases will have (as shown on the front of this form). No matter how the interest rate is computed, it will never be higher than the highest rate allowed by law.

INDEX RATES: If you and I have agreed that the interest rate on this note will be variable and will be related to an index rate, then the index we select will function only as a tool for setting the rate on this note. You do not guarantee, by selecting any index, that the rate on this note will have a particular relationship to the rate you charge on any other loans or any type or class of loans with your other customers.

SINGLE ADVANCE LOANS: If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph below.

MULTIPLE ADVANCE LOANS: If this is a multiple advance loan, you and I expect that you will make more than one advance of principal.

If this is closed end credit, then repaying a part of the principal will not entitle me to additional credit.

If this is open end credit, then repaying a part of the principal will entitle me to additional credit, unless the open end feature has expired. You will not ordinarily make an advance if it would cause the unpaid principal amount to become greater then the maximum principal amount, or if the unpaid principal amount is already greater than the maximum principal amount. You will never be obligated to make such an advance, even if you occasionally do so.

PAYMENTS BY LENDER: If you are authorized to pay, on my behalf, charges I am obligated to pay (such as property insurance premiums), then you may treat those payments as advances and add them to the unpaid principal under this note.

POST-MATURITY RATE: For purposes of deciding when the "Post-Maturity Rate" (shown on the other side) applies, the term "maturity" means the following:

(1) if the note is payable on demand, the date you make your demand;
(2) if the note is payable on demand with an alternate maturity date(s), the date you make your demand or the final alternate maturity date or the date you accelerate payment on the note, whichever is earlier; and
(3) in all other cases, the date of the last scheduled payment of principal or the date you accelerate payment on the note, whichever is earlier.

SET-OFF: You have the right to set-off any amount I owe you under this note against any right I have to receive money from you. If my right to receive money from you is owned by someone else not paying this note, your set-off can only reach funds I could have reached with my own request or endorsement. Your right of set-off does not extend to accounts where my rights are only as a fiduciary. It also does not extend to my IRA or other tax-deferred retirement account.

Your right of set-off applies without your first telling me you are going to use it. It applies no matter

what sort or value of collateral is on this loan. It also applies no matter who else has agreed to pay this note.

You will not be liable for wrongful dishonor of a check where such dishonor occurs because you set-off this debt against my account.

COSTS OF COLLECTION: If you must hire a lawyer to collect this note, I must pay his or her fee, plus court costs (except where prohibited by law).

DEFAULT: I will be in default if any one or more of the following occur:

(1) I fail to make a payment on time or in the amount due.
(2) I fail to keep the collateral insured, if required.
(3) I fail to keep any other promise I have made in connection with this loan.
(4) I fail to pay, or keep any other promise, on any other loan or agreement I have with you.
(5) Any other creditor of mine attempts to collect the debt I owe him through court proceedings.
(6) I die.
(7) I go into bankruptcy, whether by my own choice or not.
(8) I do or fail to do something which causes you to believe that you will have difficulty collecting the amount I owe you.

(9) Anything else happens which causes you to believe that you will have difficulty collecting the amount I owe you.

REMEDIES: If I am in default on this note, you have the following remedies:

(1) You may demand immediate payment of all I owe you under this note.

(2) You may set-off this debt against any right I have to the payment of money from you.

(3) You may demand more security or new parties obligated to pay this note in return for not using any other remedy.

(4) You may make use of any remedy you have under state or federal law.

(5) You may make use of any remedy given to you in any agreement securing this note.

(6) If this is a multiple advance loan, either open end or closed end, you may refuse to make advances to me while I am in default.

By selecting any one or more of these remedies you do not give up your right to later use any other remedy. By deciding not to use any remedy should I default, you do not waive your right to later consider the event a default if it happens again.

CONFESSION OF JUDGMENT AND WAIVER OF EXEMPTION: I authorize the attorneys in fact named on the front side of this form in the event of my default to obtain judgment against me for any unpaid balance of principal and interest, and for costs of collection. I agree that this judgment will be entered without any service of process on me or any other notice to me prior to entry. I waive the benefit of all homestead and other exemptions and I agree that the judgment shall be a lien on my principal residence immediately upon confession. This power of attorney shall not terminate upon my disability.

WAIVER: I give up my rights to require you to do certain things. I will not require you to:

(1) demand payment of amounts due (presentment);
(2) obtain official certification of nonpayment (protest);
(3) give notice that amounts due have not been paid (notice of dishonor).

SECURITY: The portion of this form identifying agreements securing this note is for your internal reference only. The fact that you do not list an agreement in that portion of the form does not mean that the agreement does not secure this note.

ADDITIONAL PARTIES AND SECURITY: I understand that I must pay this note even if someone else has signed it. You may sue me, or anyone else, or any of us together, to collect this note. You do not have to tell me this note has not been paid. You may release any cosigner and I will still be obligated to pay the note. If you give up any of your rights it will not affect my duty to pay this note. Extending new credit or renewing this note will not affect my duty to pay this note.

FINANCIAL STATEMENTS: I agree to provide to you, upon request, any financial statements or information you may deem necessary. I warrant that all financial statements and information I provide to you are or will be accurate, correct, and complete.

GUARANTEE: By signing below, I unconditionally guarantee the payment of any amounts owed under this note. I also agree that all the other terms of the note will apply to me.

X_____

Pay to the order of Union Recovery Limited Partnership WITHOUT RECOURSE, REPRESENTATION OR WARRANTY

RESOLUTION TRUST CORPORATION as Receiver of Federal Savings Association of Virginia

By: /s/ Karen B. Zale
Title: Attorney In Fact
Date: 6-26-95

GUARANTY

FALLS CHURCH, VA
June 8, 1989

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce FEDERAL SAVINGS BANK OF VIRGINIA, FSB (herein, with its participants, successors and assigns, called "Bank"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of THOMAS E. HORTON (herein called "Borrower") or to engage in any other transactions with Borrower, the undersigned hereby absolutely and unconditionally guarantee(s) to the Bank the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows.

A. If this ☒ is checked, the undersigned guarantee(s) to Bank the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Bank (whether such debt, liability or obligation now exists or is

hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several or joint and several, all such debts, liabilities and obligations being hereinafter collectively referred to as the "indebtedness").

The undersigned further acknowledge(s) and agree(s) with Bank that:

1. No act or thing need occur to establish the liability of the undersigned hereunder, and no act or thing except full payment and discharge of all indebtedness, shall in any way exonerate the undersigned or modify, limit or release the liability of the undersigned hereunder.

2. If paragraph A is checked, this is an absolute, unconditional and continuing guaranty of payment of the indebtedness and shall continue to be in force and be binding upon the undersigned, whether or not all indebtedness is paid in full, until this guaranty is revoked prospectively as to future transactions, by written notice actually received by the Bank, and such revocation shall not be effective as to

indebtedness existing or committed for at the time of actual receipt of such notice by the Bank, or as to any renewals, extensions and refinancings thereof, if there be more than one undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by the Bank and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) then the Bank shall have the right to declare immediately due and payable, and the undersigned will forthwith pay to the Bank, the full amount of all indebtedness, whether due and payable or unmatured. If the undersigned voluntarily commences or there is commenced involuntarily against the undersigned a case under the United States Bankruptcy Code, the full amount of all indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the undersigned hereunder shall be limited to a principal amount of $20,000.00 (if unlimited or if no amount is stated, the undersigned shall be liable for all

indebtedness, without any limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the undersigned hereunder. The Bank may apply any sums received by or available to the Bank on account of the indebtedness from Borrower or any other person (except the undersigned), from their properties, out of any collateral, security or from any other source in payment made by the undersigned unless the guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Bank, advising the Bank that such payment is made under this guaranty for such purpose.

5. The undersigned will not exercise or enforce any right of contribution, reimbursement, recourse or subrogation available to the undersigned against any person liable to payment of the indebtedness, or as to any collateral security therefor, unless and until all of the indebtedness shall have been fully paid and discharged.

6. The undersigned will pay or reimburse the Bank for all costs and expenses (including reasonable attorneys' fees and legal expense) incurred by the Bank in connection with the protection,

defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on the reverse side hereof, all of which are made a part hereof.

This guaranty is ☒ unsecured.

IN WITNESS WHEREOF, this guaranty has been duly executed by the undersigned the day and year first above written.

/s/ Robert J. Leipzig

ADDITIONAL PROVISIONS

7. Whether or not any existing relationship between the undersigned and Borrower has been changed or ended and whether or not this guaranty has been revoked, the Bank may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of indebtedness, without any consent or approval by the undersigned and without any notice to the undersigned. The liability of the undersigned shall not be affected or impaired by any of the following acts or things (which the Bank is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the

undersigned): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all indebtedness; (ii) any one or more extensions or renewals of indebtedness (whether or not for longer than the original period) or any modification of the interest rates, maturities or other contractual forms applicable to any indebtedness; (iii) any waiver or indulgence granted to Borrower, any delay or lack of diligence in the enforcement of indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any indebtedness; (iv) any full or partial release of, settlement with, or agreement not to sue, Borrower or any other guarantor or other person liable in respect of any indebtedness; (v) any discharge of any evidence of indebtedness or the acceptance of any instrument in renewal thereof or substitution therefor; (vi) any failure to obtain collateral security (including rights of setoff) for indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to protect, insure, or enforce any collateral security, or any modification, substitution, discharge, impairment, or loss of any collateral security; (vii) any foreclosure or enforcement of any collateral security; (viii) any transfer of any indebtedness or any evidence thereof; (ix) any order

of application of any payments or credits upon indebtedness; (x) any election by the Bank under § 1111(b)(2) of the United States Bankruptcy Code.

8. The undersigned waive(s) any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the undersigned will not assert, plead or enforce against the Bank any defense of waiver, release, discharge in bankruptcy, statute of limitations, res judicata, statute of frauds, anti-deficiency statute, fraud, incapacity, minority, usury, illegality or unenforceability which may be available to the Borrower or any other person, liable in respect of any indebtedness, or any setoff available against the Bank to Borrower or any other person, whether or not on account of a related transaction. The undersigned expressly agree(s) that the undersigned shall be and remain liable for any deficiency remaining after foreclosure of any mortgage or security interest securing indebtedness, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision.

9. The undersigned waive(s) presentment, demand for payment, notice of dishonor or nonpayment, and protest of any instrument evidencing indebtedness.

The Bank shall not be required first to resort for payment of the indebtedness to Borrower or other persons or their properties, or first to enforce, realize upon or exhaust any collateral security for indebtedness, before enforcing this guaranty.

10. If any payment applied by the Bank to indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of Borrower or any other obligor), the indebtedness to which such payment was applied shall for the purposes of this guaranty be deemed to have continued in existence, notwithstanding such application, and this guaranty shall be enforceable as to such indebtedness as fully as if such application has never been made.

11. The liability of the undersigned under this guaranty is in addition to and shall be cumulative with all other liabilities of the undersigned to the Bank as guarantor or otherwise, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

12. This guaranty shall be enforceable against each person signing this guaranty, even if only one person signs and regardless of any failure of other persons to sign this guaranty. If

there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each and every particular and shall be fully binding upon and enforceable against either, any or all the undersigned. This guaranty shall be effective upon delivery to the Bank, without further act, condition or acceptance by the Bank, shall be binding upon the undersigned and the heirs, representatives, successors and assigns of the undersigned and shall inure to the benefit of the Bank and its participants, successors and assigns. Any invalidity or unenforceability of any provision or application of this guaranty shall not affect other lawful provisions and application hereof, and to this end the provisions of this guaranty are declared to be severable. This guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by the undersigned and the Bank. This guaranty shall be governed by the laws of the State in which it is executed. The undersigned waive(s) notice of the Bank's acceptance hereof and waive(s) the right to a trial by jury in any action based on or pertaining to this guaranty.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS E. HORTON, et al.,

Defendants.

Filed: August 30, 1995

PLEA OF THE STATUTE OF LIMITATIONS

COMES NOW Defendant, Thomas E. Horton, by counsel, and files this plea in bar of the Motion for Judgment filed against Defendant in the above-styled action. In support of his plea of the statute of limitations, Defendant states the following:

1. Plaintiff, Union Recovery Limited Partnership ("Union"), states a single count against Defendant, seeking recovery on a demand note allegedly executed on or about June 8, 1989. Motion for Judgment, ¶¶6, 16-19.

2. Under Virginia law, a cause of action to recover on a demand note

accrues on the date the note is executed. See, e.g., Guth v. Hamlet Associates, Inc., 230 Va. 64, 334 S.E.2d 558 (1985).

3. The applicable period within which to bring a cause of action for recovery on a demand note is five years. Va. Code §8.01-246.

4. The limitation period for bringing an action on the demand note at issue in this action expired on June 8, 1994.

5. This action by Plaintiff on the demand note was filed on August 30, 1995, more than a year after the applicable limitation period had expired.

6. In an effort to avoid the consequences of the unreasonable delay in enforcing the demand note, Plaintiff seeks to invoke a six-year limitation period under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §1821 (d)(14). Motion for Judgment, ¶15. By the plain language of the statute upon which Plaintiff relies, the six-year limitation period applies only to the Resolution Trust Corporation ("RTC") suing in its capacity as receiver for a failed financial institution. 12 U.S.C. §1821(d)(14)(A) ("Notwithstanding any provision of the contract, the applicable statute of limitations with regard to any action by the [RTC] as conservator or receiver shall be.....") (emphasis added).

7. Plaintiff is neither the Resolution Trust Corporation nor the "receiver" as specified in 12 U.S.C. §1821(d)(14) and, therefore, the statute does not apply to Plaintiff.

8. Plaintiff has alleged that it obtained right, title and interest in the demand note as an assignee of the RTC Motion for Judgment, ¶14. Under controlling federal case law in this jurisdiction, the six-year limitation period under 12 U.S.C. §1821(d)(14) does not inure to the benefit of assignees of the RTC. WAMCO, III, Ltd. v. First Piedmont Mtg. Corp., 856 F. Supp. 1076 (E.D. Va. 1994).

9. Plaintiff's action against Defendant is, therefore, time-barred under applicable law in this jurisdiction.

In further support of this plea of the statute of limitations, Defendant shall submit for the Court's consideration a Memorandum of Points and Authorities in Support of Defendant's Plea, which upon filing shall be incorporated herein.

WHEREFORE, Defendant respectfully prays that this Court dismiss the Motion for Judgment against Defendant with prejudice and award Defendant costs and attorney's fees incurred in connection with this action.

Respectfully submitted,

THOMAS E. HORTON
Defendant, by counsel

Jon M. Lippard (VSB No. 31748)
JON M. LIPPARD, P.C.
First Floor
314 Commerce Street
Alexandria, Virginia 22314

Counsel for Defendant
Thomas E. Horton

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of foregoing Plea of the Statute of Limitations was mailed first-class, postage prepaid, on this 19th day of October, 1995, to the following:

Robert M. Cary, Esquire
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005

Sean C. E. McDonough, Esquire
GRAD, LOGAN & KLEWANS
112 N. Columbus St.
P.O. Box 1417-A44
Alexandria, Virginia 22313

/s/ Jon M. Lippard

No. 96-1296

In The
Supreme Court of the United States

October Term 1996

THOMAS E. HORTON,

Petitioner,

v.

UNION RECOVERY LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

Robert M. Cary*
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

****Counsel of Record***
Counsel for Respondent

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

QUESTION PRESENTED

Where a financial institution has failed, the Resolution Trust Corporation ("RTC") has been appointed receiver for the institution, and the RTC has assigned by way of sale and transfer a note in favor of the failed bank to an assignee, does the assignee stand in the shoes of the RTC with respect to the expanded statute of limitations set forth in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") so that the assignee may enforce the note purchased from the RTC?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutes 1

Statement 4

Argument 7

I. The Decision of the Supreme Court of Virginia Is Not Inconsistent with Decisions of This Court 8

A. FIRREA Is Silent on Whether the Right to Enforce a Note Pursuant to FIRREA's Extended Statute of Limitations Is Assignable 8

B. The Decision of the Supreme Court of Virginia Is Not Inconsistent with O'Melveny & Myers v. FDIC 12

1. The Supreme Court of Virginia Properly Relied on Virginia Law Where FIRREA Was Silent on Whether the Right to Enforce a Note Pursuant to FIRREA's Extended Statute of Limitations Is Assignable 12

2. Even if the Supreme Court of Virginia Had Applied Federal Common Law, the Application of Such Federal Common Law Would Have Been Entirely Consistent with O'Melveny & Myers v. FDIC and Other Decisions of This Court 14

II. The 12 Appellate Courts to Have Addressed the Issue for Which Petitioner Seeks a Writ of Certiorari Have Been Unanimous: An Assignee of the RTC or FDIC stands in the shoes of the RTC or FDIC for Purposes of Enforcing a Negotiable Instrument Pursuant to FIRREA's Extended Statute of Limitations . 17

Conclusion 19

TABLE OF AUTHORITIES

CASES

Boyle v. United Technologies Corporation,
487 U.S. 500 (1988) 14

Cadle Co. II, Inc. v. Lewis,
864 P.2d 718(Kan. 1993),
cert.denied, 114 S.Ct. 1613(1994) . 9, 17

Cadle Co. II v. Stamm,
633 So. 2d 45
(Fla. Dist. Ct. App. 1994) 9, 18

Central States Resources Corp.
v. First Nat'l Bank,
501 N.W.2d 271 (Neb. 1993) 9, 17, 18

D'Oench, Duhme & Co. v. FDIC,
315 U.S. 447 (1942) 17

FDIC v. Bledsoe,
989 F.2d 805 (5th Cir. 1993) 9, 17

Fall v. Keasler,
No. C 90 20643 SW (ARB)1991,
WL 340182 (N.D. Cal. 1991) 15

Investment Co. v. Reese,
875 P.2d 1086 (N.M. 1994) 9, 11, 17

Jackson v. Thweatt,
883 S.W.2d 171 (Tex. 1994) 9, 11, 17

Martin v. Cadle Co.,
No. 96438, 1993 WL 381101
(Id. Ct. App. 1993) 10, 18

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 9, 11

NSO Assocs v. Beychok,
659 So.2d 729 (La. 1995) 9, 11, 178

National Bank and Trust Company
at Charlottesville v. Castle,
196 Va. 686, 95 S.E.2d 228 (1955) 10

O'Melveny & Myers v. FDIC,
114 S.Ct. 2048 (1994) 10, 12, 13, 14, 17

Tivoli Ventures, Inc. v. Bumann,
870 P.2d 1244 (Colo. 1994) 9, 17

Twenty First Century Recovery, Ltd.
v. Mase,
665 N.E.2d 573 (Ill. App. 1996) ... 9, 18

Wamco III, Ltd.
v. First Piedmont Mortgage Corporation,
856 F.Supp. 1076 (E.D. Va. 1994) 18

White v. Moriarty,
19 Cal. Rptr. 2d 200,
(Ct. App. 1993) 9, 18

STATUTES

12 U.S.C. § 1441a(B)(4)(A)(1994) 5

12 U.S.C. § 1811 note,
Purposes of 1989 Amendment (1994)
(Pub. L. No. 101-73, § 101, 103
Stat. 183, 187 (1989) 3, 12, 15

12 U.S.C. § 1821(d)(14) 1, 5, 8

28 U.S.C. § 1257(a) 1

Va. Code § 8.3A-203(b) (Supp. 1995) 4, 11

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (Pet. App. A-1 - A-11) is reported at 252 Va. 418, 477 S.E.2d 521 (1996). The order and opinion of the trial court (Pet. App. A-12 - A-20) are not reported.

JURISDICTION

Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1257(a). As set forth below, the only issue of federal law is whether FIRREA addresses the assignability of the right to pursue a promissory note pursuant to the expanded statute of limitations of FIRREA. Determining that FIRREA does not address this issue, the Supreme Court of Virginia resolved the remaining issues under Virginia law.

STATUTES

I. Portions of Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")

A. Statute of Limitations Provision, 12 U.S.C. § 1821(d)(14)

(A) Notwithstanding any provision of any contract, the applicable statute of

limitations with regard to any action brought by the Corporation as conservator or receiver shall be --

(i) in the case of any contract claim, the longer of --

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law;

* * * * *

(B) For purposes of subparagraph (A), the date on which the statue of limitations begins to run on any claim described in such subparagraph shall be the later of --

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues

B. Provision Conferring Same Powers on RTC as on Federal Deposit Insurance Corporation, 12 U.S.C. § 441a(B)(4)(A)(1994)

> . . . the Corporation[1] shall have the same powers and rights to carry out its duties with respect to institutions . . . as the Federal Deposit Insurance Corporation . . . .

C. Purposes of FIRREA, 12 U.S.C. § 1811 note, Purposes of 1989 Amendment (1994) (Pub. L. No. 101-73, § 101, 103 Stat. 183, 187 (1989)

> The purposes of this Act are as follows:
>
> * * * * *
>
> (8) To provide funds from public and private sources to deal expeditiously with failed depository institutions.
>
> * * * * *

---

[1] "[T]he Corporation" refers to the RTC.

II. Provision of Uniform Commercial Code as Enacted in Virginia Addressing Rights Vested in Transferees Upon Transfer of Negotiable Instruments, Va. Code § 8.3A-203(b) (Supp. 1995)

> Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

STATEMENT

Petitioner Thomas E. Horton ("Horton" or "Petitioner") borrowed $80,000 from Federal Savings Bank of Virginia ("the Bank") on June 8, 1989, which was memorialized by a promissory note executed by Petitioner. Pet. App. A-2. The Bank subsequently failed, and the RTC was appointed as its receiver on April 10, 1992. Id. As receiver for the Bank, the RTC acquired all right title and interest in the assets of the Bank including the Horton note. Id. On June 26, 1995, Union purchased the right

to enforce the Horton note and was assigned all right, title and interest in the note. Pet. App. A-2; A-22, A-28. Union initiated litigation to enforce the Horton note on August 30, 1995. Pet. App. A-2.

Under FIRREA, the statute of limitations for claims brought by the RTC to enforce contractual obligations owed to failed financial institutions is not less than six years from the date the RTC was appointed receiver for the institution. 12 U.S.C. § 1821(d)(14)(A)(i)(1994); 12 U.S.C. §1441a(B)(4)(A)(1994).[2] The RTC was appointed receiver for the Bank on April 10, 1992. Pet. App. A-2. Thus, as all parties acknowledge, the RTC had until April 9, 1998, to bring an action to enforce the Horton note. Pet. App. A-7. As the purchaser of the note from the RTC, Union was an assignee of the RTC and submitted, as supported by the decision of **every appellate court to have considered the issue**,[3] that it stood in the shoes of the RTC for purposes of enforcing the note pursuant to FIRREA's six-year statute of limitations. Pet. App. A2 - A3.

---

[2] The statute of limitations period under FIRREA is the longer of six years or the period applicable under State law. 12 U.S.C. § 1821(d)(14)(A)(1994).

[3] See infra at 17.

Horton asserted that Union was not entitled to stand in the shoes of the RTC with respect to the statute of limitations and that Union was time-barred from enforcing the note he signed. Pet. App. A-3. Horton argued that Union did not stand in the shoes of the assignor and that therefore the statute of limitations reverted to the shorter Virginia statue of limitations upon transfer of the note to Union. Id. Under the shorter Virginia statue of limitations, Union's action would have been time barred. Id. The parties filed briefs on the issue of the statute of limitations, and oral argument was held. Id. The trial court held that Union was barred by the Virginia statute of limitations from enforcing the Horton note. Id. The factual bases of the trial court's ruling were the facts alleged in the pleadings and other papers filed by the parties, and no evidentiary hearing was necessary. Pet. App. A-24. Union filed a Motion for Reconsideration, which was denied. Pet. App. A-3.

Union petitioned the Supreme Court of Virginia to decide the statute of limitations issue, and the Supreme Court of Virginia agreed to hear Union's appeal. Pet. App. A-4. The parties briefed the issue, and oral argument was held. On November 1, 1996, the Supreme Court of Virginia reversed the decision of the trial court. Pet. App. A-1 - A-11. The Supreme Court of Virginia held

in a unanimous decision that "it is well established law in Virginia that an assignee obtains his rights from the assignor, and, thus, he is said to 'stand in the shoes' of the assignor when pursuing an action on the contract or instrument assigned." Pet. App. A-7. The Supreme Court of Virginia further held that FIRREA did not address the issue of whether FIRREA's extension of the statute of limitations was assignable. Pet. App. A-10. Thus, the Supreme Court of Virginia applied Virginia law and held that Union purchased the right to enforce the note under FIRREA's extended statute of limitations. Pet. App. A-7 - A-11. The Supreme Court of Virginia thus denied Petitioner Horton the windfall for which he had argued.

ARGUMENT

Petitioner argues that the Supreme Court of Virginia disregarded the language of the FIRREA statute and created new federal common law in holding that Union was entitled to enforce the note it purchased from the RTC. In fact, the Supreme Court of Virginia determined that the FIRREA statute is silent on the issue of assignability and thus applied Virginia law to the issue. Petitioner also asserts that there is "a substantial possibility" of a split in appellate authority over the issue presented by

this petition, even though all 12 appellate decisions to date have rejected Petitioner's position. Petitioner's arguments fail. His petition should be denied.

I. THE DECISION OF THE SUPREME COURT OF VIRGINIA IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT

A. FIRREA Is Silent on Whether the Right to Enforce a Note Pursuant to FIRREA's Extended Statute of Limitations Is Assignable

Plaintiff argues that the plain language of FIRREA renders the right to enforce an instrument pursuant to FIRREA's extended statute of limitations non-assignable. Not so. Nowhere does FIRREA address whether its extended statue of limitations is assignable.[4] The

---

[4] A reading of the relevant provisions of the FIRREA statute confirms that FIRREA does not address this issue. The relevant portion of the FIRREA statute provides: "Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be (i) in the case of any contract claim, the longer of -- (I) the 6-year period beginning on the date the claim accrues; or (II) the period applicable under State law." 12 U.S.C. § 1821(d)(14). The statute simply does not mention assignability. Indeed, one of the express purposes of FIRREA was to "provide funds from . .

Supreme Court of Virginia and every other appellate court to have considered the issue have agreed that FIRREA is silent on the issue of whether the right to enforce an instrument pursuant to its extended statute of limitations is assignable. See decision of Virginia Supreme Court below, Pet. App. A-10; FDIC v. Bledsoe, 989 F.2d 805, 809 - 810 (5th Cir. 1993); Jackson v. Thweatt, 883 S.W.2d 171, 175 (Tex. 1994); Cadle Co. II, Inc. v. Lewis, 864 P.2d 718 (Kan. 1993), cert. denied, 114 S.Ct. 1613 (1994); Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244, 1248 (Colo. 1994); Central States Resources Corp. v. First Nat'l Bank, 501 N.W.2d 271 (Neb. 1993); Investment Co. v. Reese, 875 P.2d 1086, 1092 (N.M. 1994); NSO Assocs v. Beychok, 659 So.2d 729 (La. 1995); Twenty First Century Recovery, Ltd. v. Mase, 665 N.E.2d 573, 576 (Ill. App. 1996); Cadle Co. II v. Stamm, 633 So. 2d 45, 46 (Fla. Dist. Ct. App. 1994): White v. Moriarty,

---

. private sources to deal expeditiously with failed depository institutions", which can only be accomplished if the RTC and FDIC are able to sell their assets to private sources. See infra at 14-16. Thus, Congress intended what the Supreme Court of Virginia held -- that the long-standing principle that an assignee stands in the shoes of the assignor should provide the rule of decision. Congress is presumed to have known that this was the law (of every jurisdiction of which Respondent is aware) when it enacted FIRREA. See, e.g. Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

19 Cal. Rptr. 2d 200 (Ct. App. 1993); Martin v. Cadle Co., No. 96438, 1993 WL 381101 (Id. Ct. App. 1993). Where a statute is silent, courts may look to state law for the rule of decision. See O'Melveny & Myers v. FDIC, 114 S.Ct. 2048, 2054 (1994). In this case, the Supreme Court of Virginia looked to the law of Virginia:

> It is **well established law in Virginia** that an assignee obtains his rights from the assignor, and, thus, he is said to 'stand in the shoes' of the assignor when pursuing an action on the contract or instrument assigned.

Pet. App. A-7 (emphasis added). The Supreme Court of Virginia applied the principle of Virginia law that an assignee stands in the shoes of the assignor, because FIRREA is silent on this issue.

That an assignee stands in the shoes of the assignor for purposes of enforcing an instrument has long been the common law of Virginia. See, e.g., National Bank & Trust Co. at Charlottesville v. Castle, 196 Va. 686, 692-93, 95 S.E.2d 228, 232 (1955) (cited by Supreme Court of Virginia at Pet. App. 7 for proposition that assignee stands in the shoes of an assignor) Though not cited by the Supreme Court of Virginia, the

principle that an assignee stands in the shoes of the assignor for purposes of enforcing an instrument is also Virginia statutory law. The negotiable instrument at issue in this case was assigned by way of sale and transfer from the RTC to Union. Pet. App. A-33, A-45 - A-46. The Uniform Commercial Code as enacted in Virginia provides that "[t]ransfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument . . . ." Va. Code § 8.3A-203(b) (Supp. 1995) (emphasis added). FIRREA's extension of the statute of limitations "clearly creates a right" to enforce negotiable instruments. See NSO Assocs v. Beychok, 659 So.2d 729, 733 (La. 1995); Jackson v. Thweatt, 883 S.W.2d 171, 176 (Tex. 1994); Investment Co. v. Reese, 875 P.2d 1086, 1093 (N.M. 1994). Thus, the transferee of a negotiable instrument is vested with the right to enforce the instrument pursuant to FIRREA's extension of the statute of limitations. That an assignee stands in the shoes of the assignor is a bedrock principle of Virginia law (and in every jurisdiction of which Respondent is aware).[5]

Ultimately, Petitioner does not challenge the principle that an assignee stands in the shoes of the assignor.

---

[5] Congress is presumed to have known the law when it enacted FIRREA. See, e.g., Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

Rather, he argues that the "plain language" of the FIRREA statute somehow precludes assignment of that right pursuant to state law. This is simply not so. The statute is silent on the issue of assignability. Accordingly, the Supreme Court of Virginia appropriately applied the principle of Virginia law that assignees stand in the shoes of their assignors.[6]

B. The Decision of the Supreme Court of Virginia Is Not Inconsistent with O'Melveny & Myers v. FDIC

1. The Supreme Court of Virginia Properly Relied on Virginia Law Where FIRREA Was Silent on Whether the Right to Enforce a Note Pursuant to FIRREA's Extended Statute of Limitations Is Assignable

---

[6] Petitioner's argument that the legislative history of FIRREA does not contemplate the sale of instruments to private sources is breathtaking. One of the express purposes of FIRREA was "[t]o provide funds from public and **private sources** to deal expeditiously with failed depository institutions." 12 U.S.C. § 1811, Purposes of 1989 Amendment (1994) (Pub. L. No. 101-73, § 101, 103 Stat. 183, 187 (1989))(emphasis added). See infra at 14-16.

Petitioner argues that the decision of the Supreme Court of Virginia is inconsistent with that of O'Melveny & Myers v. FDIC, 114 S.Ct. 2048 (1994). Petitioner cites the language of O'Melveny which held that generally "matters left unaddressed [by a statutory scheme such as FIRREA] are presumably left subject to the disposition provided by state law." O'Melveny, 114 S. Ct. at 2054. Petitioner then seems to argue that the Supreme Court of Virginia ignored the law of Virginia and created a new rule of federal common law in holding that the note at issue could be enforced. That is not what happened. The Supreme Court of Virginia held **as a matter of Virginia law** that an assignee stands in the shoes of the assignor. The critical passage from the opinion of the Supreme Court of Virginia bears repeating:

> It is **well established law in Virginia** that an assignee obtains his rights from the assignor, and, thus, he is said to 'stand in the shoes' of the assignor when pursuing an action on the contract or instrument assigned.

Pet. App. A-7 (emphasis added). The Supreme Court of Virginia did just what Petitioner argues it should have done. It applied Virginia law where FIRREA was silent.

2. Even if the Supreme Court of Virginia Had Applied Federal Common Law, the Application of Such Federal Common Law Would Have Been Entirely Consistent With O'Melveny & Myers v. FDIC and Other Decisions of This Court

If the decision under Virginia law had been that urged by Petitioner -- that the note became unenforceable upon being purchased by Union -- the Supreme Court of Virginia would have been required to apply federal common law under principles articulated in the O'Melveny decision and other decisions of this Court. The O'Melveny decision teaches that while there is no "federal general common law", courts should create a rule of federal common law where there is "significant conflict between some federal policy or interest and the use of state law." O'Melveny, 114 S.Ct. at 2055 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)). Certainly, there are cases where a rule of federal common law is required. For example, in Boyle v. United Technologies Corporation, 487 U.S. 500 (1988), this Court held that private defense contractors doing business with the federal government inherit the government's immunity from

tort liability, even though the federal statute conferring such immunity upon the government does not mention private contractors. In other words, private defense contractors stand in the shoes of the government for purposes of tort immunity. Otherwise, there would have been a significant conflict between state law and federal policy.

So it would have been here (if Virginia law had been interpreted as Petitioner urges it should have been). One of the purposes of FIRREA was to "provide funds from public and **private sources** to deal expeditiously with failed depository institutions." 12 U.S. C. § 1811, Purposes of 1989 Amendment (1994) (Pub. L. No. 101-73, § 101, 103 Stat. 183, 187 (1989) (emphasis added). If Virginia law had been interpreted as Petitioner urges, to render an enforceable negotiable instrument unenforceable simply because it has been purchased from the RTC or FDIC by a **private source**, Virginia law would have been directly at odds with federal policy as expressly articulated in the FIRREA legislation. This federal policy was aptly explained in Fall v. Keasler, No. C 90 20643 SW (ARB) 1991 WL 340182 (N.D. Cal. 1991):

> To hold that assignees are relegated to the state statute of limitations would serve only to shrink the private market

> for the assets of failed banks. It would require the FDIC [or RTC] to hold onto and prosecute all notes for which the state statute of limitation has expired because such obligations would be worthless to anyone else. This runs contrary to the policy of allowing the FDIC [or RTC] to rid the federal system of failed bank assets. The FDIC [or RTC] can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC [or RTC].

The position argued by Petitioner, that enforceable notes become unenforceable upon being assigned by way of sale to private parties, is repugnant to express federal policy. In this case, the decision of the Supreme Court of Virginia applying Virginia law is consistent with federal policy. If the result under Virginia law had been that urged by Petitioner, however, application of federal common law would have been required under the principles articulated

in O'Melveny and other decisions of this Court.[7]

II. THE 12 APPELLATE COURTS TO HAVE ADDRESSED THE ISSUE FOR WHICH PETITIONER SEEKS A WRIT OF CERTIORARI HAVE BEEN UNANIMOUS: AN ASSIGNEE OF THE RTC OR FDIC STANDS IN THE SHOES OF THE RTC OR FDIC FOR PURPOSES OF ENFORCING A NEGOTIABLE INSTRUMENT PURSUANT TO FIRREA'S EXTENDED STATUTE OF LIMITATIONS

The 12 appellate courts to have considered the issue for which petitioner seeks a writ of certiorari have been unanimous in holding that an assignee of the RTC or FDIC stands in the shoes of the RTC or FDIC for purposes of enforcing a negotiable instrument under FIRREA's extended statute of limitations. See decision of Virginia Supreme Court below, Pet. App. A-1 - A-11; FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993); Jackson v. Thweatt, 883 S.W.2d 171 (Tex. 1994); Cadle Co. II, Inc. v. Lewis, 864 P.2d 718 (Kan. 1993), cert. denied, 114 S.Ct. 1613 (1994); Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244 (Colo. 1994); Central States Resources Corp. v. First Nat'l

---

[7] Petitioner devotes two pages of his Petition for Writ of Certiorari to addressing the Court's decision in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). The Supreme Court of Virginia did not rely on the D'Oench Duhme decision.

Bank, 501 N.W.2d 271 (Neb. 1993); Investment Co. v. Reese, 875 P.2d 10896 (N.M. 1994); NSO Assocs v. Beychok, 659 So.2d 729 (La. 1995); Twenty First Century Recovery, Ltd. v. Mase, 665 N.E.2d 573 (Ill. App. 1996); Cadle Co. II v. Stamm, 633 So. 2d 45 (Fla. Dist. Ct. App. 1994): White v. Moriarty, 19 Cal. Rptr. 2d 200 (Ct. App. 1993); and Martin v. Cadle Co., No. 96538, 1993 WL 381101 (Id. Ct. App. 1993). Petitioner does not disagree that the Nation's appellate courts speak with one voice on this issue. Instead, Petitioner speculates that an aberrational decision may be rendered in the future. The Court should not grant a writ of certiorari based on petitioner's mere speculation.[8]

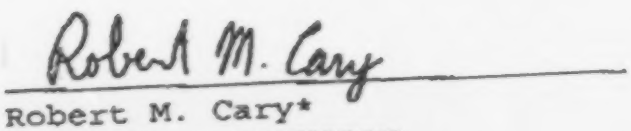
---

[8] That the Supreme Court of Virginia's decision is inconsistent with the prior decision of one federal trial court sitting in Virginia, Wamco III, Ltd. v. First Piedmont Mortgage Corporation, 856 F.Supp. 1076 (E.D. Va. 1994), does not render this case worthy of a writ of certiorari. First, if the Wamco court were to reconsider the issue with the benefit of the Supreme Court of Virginia's decision (which expresses Virginia law and was not available when the Wamco court reached its decision), the Wamco court would probably reach a different result. Second, of course, the appellate courts to have addressed the issue are unanimously consistent with the decision of the Supreme Court of Virginia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



Robert M. Cary*
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

*Counsel of Record
Counsel for Respondent

March 3, 1997

No. 96-1296

Supreme Court, U.S.
FILED
MAR 12 1997
OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1996

THOMAS E. HORTON,
Petitioner,

v.

UNION RECOVERY LIMITED PARTNERSHIP,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY TO BRIEF IN OPPOSITION

Jon M. Lippard*
JON M. LIPPARD, PC
First Floor
314 Commerce Street
Alexandria, VA 22314
(703) 836-8723

****Counsel of Record***
Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF TO BRIEF IN OPPOSITION 1

ARGUMENT 1

I. THERE IS NOW AN ACTUAL SPLIT AMONG THE CIRCUITS AS TO WHETHER FEDERAL COMMON LAW OR STATE LAW APPLIES TO THE ISSUE OF ASSIGNABILITY OF THE RTC'S RIGHTS UNDER FIRREA 1

II. FEDERAL LAW GOVERNS THE NATURE OF THE RIGHTS CONFERRED BY FIRREA UPON THE RTC AS RECEIVER FOR FAILED FINANCIAL INSTITUTIONS 2

CONCLUSION 4

TABLE OF AUTHORITIES

Cases

Page

FDIC v. Bledsoe,
989 F.2d 805 (5th Cir. 1993.....1

Federal Financial Co. v. Hall,
No. 96-1143, (4th Cir. March 4, 1997).....1, 2, 3

O'Melveny & Myers v. FDIC,
___ U.S. ___, 114 S. Ct. 2048, 2054 (1994.....1

RTC Commercial Loan Trust v. Winthrop Mgt.,
923 F. Supp. 83 (E.D. Va. 1996) 3

WAMCO III, Ltd. v. First Piedmont Mortgage Corporation,
856 F. Supp. 1076 (E.D. Va. 1994)).....2, 3

REPLY BRIEF TO BRIEF IN OPPOSITION

Thomas E. Horton respectfully submits this brief in reply to Union Recovery Limited Partnership's brief in opposition to the petition for a Writ of Certiorari.

ARGUMENT

I. THERE IS NOW AN ACTUAL SPLIT AMONG THE CIRCUITS AS TO WHETHER FEDERAL COMMON LAW OR STATE LAW APPLIES TO THE ISSUE OF ASSIGNABILITY OF THE RTC'S RIGHTS UNDER FIRREA.

On March 4, 1997, the United States Court of Appeals for the Fourth Circuit issued its opinion in Federal Financial Co. v. Hall, No. 96-1143 (4th Cir. March 4, 1997). Relying on the decision of the United States Supreme Court in O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S.Ct. 2048 (1994), the Fourth Circuit flatly rejected the flawed analysis of FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993), and its progeny. Federal Financial, slip op. at 4-7.

In Federal Financial, the Fourth Circuit did what the Virginia Supreme Court failed to do in the case below, which is to examine and to expose the suspect rationale of the Bledsoe cases, upon which the Virginia Supreme Court relied and Respondent continues to rely. Resp. Brief at 17-18. In substance, though not in result, the Fourth Circuit endorsed the analysis presented by Horton in this petition. With the Fourth Circuit opinion in Federal Financial, there is now a split in authority between the Fifth Circuit and the Fourth Circuit over whether federal common law or state law governs the question presented on this petition.

II. FEDERAL LAW GOVERNS THE NATURE OF THE RIGHTS CONFERRED BY FIRREA UPON THE RTC AS RECEIVER FOR FAILED FINANCIAL INSTITUTIONS.

The Fourth Circuit in Federal Financial failed to determine whether, as a matter of federal law, the FIRREA statute of limitations confers upon the RTC a right which is "personal" to the RTC in its capacity as receiver for a failed financial institution. Because of this oversight, the Fourth Circuit incorrectly relied upon the decision of the Virginia Supreme Court in the case below in reaching its conclusion that the FIRREA statute of limitations is assignable. However, the Virginia Supreme Court did not discuss in its opinion the federal law issue of whether the FIRREA statute of limitations is a right "personal" to the RTC. The Virginia Supreme Court merely refused, without explanation, to adopt the conclusion of WAMCO that the federal law right is "personal" to the RTC in its capacity as receiver, apparently finding comfort in the fact that the Bledsoe cases had made no express determination that the federal law right was "personal" to the RTC.

Because the Virginia Supreme Court did not address the issue of whether the FIRREA statute of limitations is a right "personal" to the RTC, the Virginia Supreme Court may very well have found it implicit in the holdings of the Bledsoe cases that, because the right was determined to be assignable, the courts must necessarily have determined that, as a matter of federal law, the right conferred upon the RTC was not "personal." This is at least a plausible explanation why the Virginia Supreme Court rejected WAMCO without explanation and, then, cited Bledsoe as the principal case upon which it relied. If, in fact, the Virginia Supreme Court relied upon an implicit finding in the Bledsoe cases that, as a matter of federal law, the right is not "personal" to the RTC, then the Fourth Circuit opinion raises serious concern

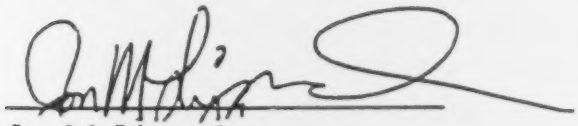
regarding the Virginia Supreme Court's reliance on Bledsoe. If, on the other hand, the Virginia Supreme Court ruled as a matter of state law that the right is not "personal" to the RTC, then the Virginia Supreme Court improperly applied state law to define the scope of a federal law right expressly conferred upon the RTC by Congress and the Fourth Circuit is wrong to follow the Virginia Supreme Court ruling. Either way, review by the United States Supreme Court is warranted.

Federal law, not state law, determines the nature of a right conferred upon an entity, here the RTC, by federal legislation. To date, no federal court other than WAMCO III, Ltd. v. First Piedmont Mortgage Corporation, 856 F. Supp. 1076 (E.D. Va. 1994) (FIRREA statute of limitations is personal right of RTC arising solely by virtue of its status as receiver), and RTC Commercial Loan Trust v. Winthrop Mgt., 923 F. Supp. 83 (E.D. Va. 1996) (right to enforce contract in federal court is a personal right of RTC as receiver), have ruled precisely on this issue of federal law. The Fourth Circuit acknowledged that "[u]nder the WAMCO analysis, the RTC's right to the six-year statute of limitations is 'personal to the assignor' and, therefore, under general common law principles, not assignable." Federal Financial, slip op. at 4-5. The Fourth Circuit did not take issue with the finding of the WAMCO court that the FIRREA statute of limitation is a right which is "personal" to the RTC. Nor did the Fourth Circuit discuss why an analysis of the nature of the statutory right, as a matter of federal law, is not necessary.

CONCLUSION

For the reasons set forth above and as stated in the petition, this Court should grant the petition for a Writ of Certiorari.

Date: March 12, 1997



Jon M. Lippard
Counsel of Record
JON M. LIPPARD, P.C.
314 Commerce Street, First Floor
Alexandria, Virginia 22314